(23,793)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 642.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, APPELLANT,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 At a Stated Term of the District Court of the United States within and for the Sixth Judicial Circuit and Eastern Division of the Southern District of Ohio, Begun and Held at the Court Rooms in the City of Columbus, on the First Tuesday of December, Being also the Third Day of That Month, in the Year of Our Lord One Thousand Nine Hundred and Twelve, and in the One Hundred and Thirty-seventh Year of the Independence of the United States of America.

Present: The Hon. John E. Sater, District Judge.
Among the proceedings had were the following, towit:

No. 1598.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

R. M. DITTEY, F. E. MUNN, and CHR. PABST, as The Tax Commission of Ohio, and THE TAX COMMISSION OF OHIO, Defendants.

Be it remembered that heretofore towit, on the 4th day of November, A. D. 1911, came the Plaintiff, and filed in the Clerk's Office of said Court, its certain Bill of Complaint in this cause, against said defendants, which said Bill of Complaint is clothed in the words and figures following, towit:

Bill of Complaint.

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States, in and for the Southern District of Ohio, Eastern Division, in Chancery Sitting:

The Ohio River and Western Railway Company, a corporation duly organized under the laws of the State of Ohio, having
2 its principal office and place of business in the County of Monroe and State of Ohio, and a resident and citizen of the State of Ohio, brings this, its bill, against R. M. Dittey, F. F. Munn, and Chr. Pabst, as The Tax Commission of Ohio, and The Tax

Commission of Ohio, all of whom are residents of the City of Columbus, Franklin County, Ohio, and are citizens and inhabitants of said City of Columbus, Franklin County, Ohio, and of said Southern District of Ohio, Eastern Division.

And thereupon the plaintiff complains and says:

1. The controversy herein arises under the Constitution of the United States. The amount in dispute and involved herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars.

2. The Ohio River and Western Railway Company is and for several years last past has been a corporation duly formed and existing as such under the laws of Ohio, for the purpose of owning and operating a narrow gauge railroad, extending from Zanesville in Muskingum County, Ohio, through a portion of said Muskingum County and a portion of Noble and Guernsey Counties, Ohio, and into Belmont County, Ohio, terminating at the city of Bellaire, in all a distance of about one hundred and eleven miles. The plaintiff owns and operates, and during said period has owned and operated, said railroad and for that purpose owns and uses the necessary rolling stock, fixtures, and appurtenances, and is and has been engaged in the transportation of persons and property, as a common carrier, and is engaged in interstate and foreign commerce and in intrastate commerce; but the amount of interstate traffic moved by said plaintiff and its gross earnings therefrom are and will continue to be relatively small, and the gross earnings therefrom, together with all earnings derived from business done for the federal
3 government, do not constitute more than about ten per cent of the plaintiff's gross earnings.

3. The Tax Commission of Ohio is a Commission created by an Act of the General Assembly of Ohio, enacted May tenth, 1910, entitled: "An Act To create a tax commission, define its powers and duties," etc. (101 Ohio Laws, 399); and also an Act of the General Assembly of Ohio, enacted the thirty-first day of May, 1911, entitled: "An Act To repeal sections 5446 to 5542-8, inclusive, and 5542-10 to 5542-24, inclusive, of the General Code, as enacted May 10, 1910, (101 Ohio L., 399), relating to the tax commission of Ohio and to further define its powers and duties."—which said Acts clothe said Commission with certain powers and impose upon it certain duties.

4. Said Act of May thirty-first, 1911, among other things, defines a railroad company as—

"any person or persons, firm or firms, copartnership or voluntary "association, joint stock association, company or corporation, "wherever organized or incorporated. * * *
* * * "When engaged in the business of operating a railroad, "either wholly or partially within this State, on rights-of-way as- "quired and held exclusively by such company, or otherwise."

5. Sections 81 and 83 of said Act require each railroad company annually, on or before the first day of September, under oath, to make and file with said Tax Commission, a statement setting forth, among other things, the entire gross earnings, includi[illegible] all

sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government, and also the total gross earnings of such company for such period in this state for business done within this state.

6. Section 88 of said Act provides that on the first Monday of October, said Commission shall ascertain and determine the gross earnings of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived from interstate business or business done for the federal government, and that the amount so ascertained by said Commission shall be the gross earnings of such railroad company for such year.

7. Section 93 of said Act provides that on the first Monday of November, said Commission shall certify to the Auditor of State the amount of gross earnings so determined of each railroad company, for the year ending on the thirtieth day of June next preceding.

8. Section 97 of said Act provides that in the month of November, the Auditor of State shall charge for collection from each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by said Commission as the gross earnings of such company on its intrastate business for the year covered by its annual report to said Commission, as required by said Act, by taking four per cent. of all such gross earnings, which said tax shall not be less than ten dollars in any case.

9. Section 99 provides that the Auditor of State shall then prepare proper duplicates and reports and certify them to the Treasurer of State for collection, and that upon the receipt of such duplicates the Treasurer shall notify each company charged with taxes of the amount due from it.

10. Section 102 of said Act provides that if any public utility, including railroads, fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, the Treasurer of State shall certify the same to the Auditor of State, who shall add to the tax a penalty of fifteen per cent thereon and prepare proper duplicates of such taxes and penalties and certify them to the Treasurer of State for collection, and said Treasurer of State, thirty days after he receives the same, shall certify to said Commission a list of such public utilities and corporations as have failed to pay such taxes and penalties thereon.

11. Section 103 of said Act provides that such taxes and penalties may be recovered by an action in the name of the State, which may be brought in the Court of Common Pleas of Franklin County or of any county in which the corporation has an office or place of business, or in which the public utility is doing business; that the Attorney General shall institute such an action in any of such courts as said Commission may direct, and that in any such action it shall

be sufficient to allege that the tax or penalty sought to be recovered stands charged on the delinquent duplicate of the Treasurer of State, and that the same has been unpaid for a period of thirty days after having been placed thereon.

12. Said Act further provides that said excise tax shall be paid into and become a part of the general revenue fund of the State.

13. Said Act further provides that these taxes and penalties required to be paid by it shall be the first and best lien on all the property of the public utility or corporation.

14. Section 120 of said Act provides that if a corporation fails to pay said tax for ninety days after the time prescribed in said Act as aforesaid for paying the same, the said Commission shall certify such fact to the Secretary of State, and the Secretary of State shall thereupon cancel the articles of incorporation of
6 such corporation, if it be organized under the laws of Ohio, by proper entry upon the margin of the record thereof, and that thereupon all the powers, privileges and franchises conferred upon such corporation by such articles of incorporation shall cease and determine; and that the Secretary of State shall immediately notify such corporation of the action taken by him.

15. Section 121 of said Act provides that any person or persons who shall exercise or attempt to exercise any powers, privileges or franchises under the articles of incorporation after the same are cancelled, shall be fined not less than one hundred dollars nor more than one thousand dollars.

16. Section 123 of said Act provides that in addition to all other remedies, the Attorney General shall, upon the request of said Commission, whenever said tax or said penalty shall have remained unpaid for a period of ninety days, apply to the Common Pleas Court of Franklin County, Ohio, or of any county of the State where said public utility or corporation is located, for an injunction to restrain the same from the transaction of any business within this State until the payment of such tax or penalty, and that if it be made to appear to the Court, upon hearing thereof, that such public utility has failed or neglected for ninety days to pay said tax or penalty, such Court of Common Pleas shall grant and issue such injunction.

17. Section 33 of said Act provides that no injunction shall issue, suspending or staying any order, determination or direction of the Commission, or any action of the Auditor of State, Treasurer of State, or Attorney General, required by law to be taken in pursuance of any such order, determination or direction; but nothing herein shall affect any right or defense in any action to collect any tax or penalty.

7 18. Prior to September first, 1911, the plaintiff, under express protest and solely to avoid the pains penalties and forfeitures hereinafter described, and not admitting or intending to admit the validity of said tax, but objecting to and protesting against the same, filed with said Commission, upon its demand therefor under the pains and penalties of said Act, a statement showing, among other things, the entire gross earnings of the plaintiff, including

all sums earned or charged, whether actually received or not, for the year ending June 30th, 1911, from whatever source derived, for business done within this State, excluding therefrom all earnings derived from interstate business or business done for the federal government, said entire gross earnings being the sum of one hundred and sixty six thousand, three hundred and forty dollars ($166,340).

19. On October 2nd, 1911, being the first Monday of October, said Commission ascertained and determined the gross earnings of the plaintiff. Plaintiff does not know and has not the means of knowing the exact amount so ascertained and determined by said Commission, because it is claimed by said Commission that said sum returned by plaintiff, as aforesaid, is too small, and that certain deductions have been improperly made from the gross receipts of plaintiff from every source, but said sum so ascertained and determined by said Commission is not less than said sum returned by plaintiff as aforesaid.

20. On the first Monday of November, 1911, to-wit, November sixth, 1911, said Commission threatens to and will, unless restrained by the order of this Court, certify to the Auditor of State the amount of the gross earnings of the plaintiff so determined by it as aforesaid, which said sum will be equal to or greater than the amount returned by plaintiff as aforesaid, and said Auditor of State will thereupon forthwith charge for collection from plaintiff, a sum pur-
8 porting to be in the nature of an excise tax for the privilege of carrying on its intrastate business, which sum will be four per cent. of said amount so certified by said Commission, and will be at least four per cent. of said sum of one hundred and sixty six thousand, three hundred and forty dollars ($166,340), to-wit: sixty six hundred and fifty three dollars and sixty cents, ($6,653.50), and said Auditor of State will thereupon forthwith prepare deplicates and report containing said sum charged against plaintiff, and will certify them to the Treasurer of State for collection, and said Commission will certify such default to the Sec'y of State who will immediately cancel its articles.

21. The capital of the plaintiff has been and is practically without exception all invested in the said railroad owned and operated by it as aforesaid which said investment was a reasonable and proper one.

22. Due care and prudence have been exercised in the construction equipment, maintenance and operation of said railroad property and in the conduct of its business, nor has the same been characterised by waste or extravagance. On the contrary, the greatest economy has been and is being practiced in a bona fide effort to make said railroad yield a fair return upon the investment therein. Many of its officers have served without salary, and all expenses have been kept at a minimum. All practical means have been exhausted to increase or render more remunerative plaintiff's freight and passenger traffic, or either of them.

23. The volume of plaintiff's passenger traffic exceeds and always has exceeded the volume of its freight traffic, and the revenue derived from its passenger traffic exceeds and always has exceeded that from

its freight traffic. While there has been a gradual increase in the number of passengers carried from year to year, the benefit of this increase has been practically destroyed by the enactment by
9 the State of Ohio of the so-called two cent passenger fare law, which said law the plaintiff, though believing the same to be confiscatory, has obeyed for fear of the enormous pains and penalties imposed for its violation.

24. Notwithstanding the efforts of the plaintiff, it has never been able to earn and is not now able to earn from its interstate or its intrastate business, or both combined, after paying necessary and proper expenses, including taxes other than said excise tax, a return on the investment in its said railroad, equal to or as much as the current rate of return on legitimate and high grade investments at all times readily available on the market. Nor have its intrastate earnings, after deducting expenses properly attributable to intrastate operations, (including taxes other than said excise tax) been sufficient to yield a return on that portion of said investment properly attributable to intrastate operations, equal to or as much as the current rate of return on legitimate high grade investments at all times readily available on the market as aforesaid; and said conditions will continue to exist and will exist during the year for which said excise tax is intended to cover.

25. Said excise tax, and every part thereof, exceeds the reasonable annual value of the privilege of carrying on plaintiff's intrastate business; and said excise tax for the current year, amounting to at least sixty six hundred and fifty three dollars and sixty cents ($6,653.60), as aforesaid, is wholly, and as to every part thereof, in excess of the reasonable annual value of carrying on plaintiff's intrastate business during said current year. Said tax is, therefore, invalid and void, and in violation of the Constitution of
10 Ohio, and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and in violation of the Fourteenth Amendment to the Constitution of the United States.

26. Plaintiff further says that said Act of May thirty-first, 1911, attempts to classify the corporations carrying on business in the State of Ohio for purposes of raising general revenue by an excise tax imposed for the privilege of carrying on intrastate business; that said Act provides that an excise tax for such privilege shall be imposed upon all public utilities, as defined by said Act.

27. In Section 39 of said Act, the term "public utility," as used therein, is defined to include corporations, firms and individuals engaged in certain lines of business affected with a public interest, including railroads; but said definition does not include or purport to include all kinds of business affected with a public interest carrying on intrastate business in the State of Ohio, nor all real public utilities so carrying on such business therein. The intrastate business of many of said excluded public utilities is and has been and will be highly remunerative, and the privilege of carrying the same on of equal or greater value than the privileges sought to be taxed by said excise tax. The privilege of carrying on their intrastate business by said excluded classes of public utilities is not taxed by said Act,

or by any other law whatsoever. The public utilities upon which said excise tax is imposed by said Act must compete and continue to compete with said excluded classes of public utilities in the money markets, for the securing of funds necessary to the establishment, betterment, and maintenance of their respective lines of business, and by reason of the arbitrary and discriminatory classification aforesaid, under which certain public utilities are subject to
11 said excise tax and others are excluded and free therefrom, those utilities subject thereto, including railroad companies, are placed at a great and constant disadvantage in perfecting and maintaining their several financial arrangements, and will continue to be.

28. Plaintiff further says that said classification is arbitrary, unreasonable, and unduly and injustly discriminatory against all of the corporations included in said Section 39 of said Act, and particularly railroad companies, and is unjustly and unduly unequal in its operation, and by reason thereof said classification and said excise tax based thereon are invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

29. Plaintiff further says that said Act makes a sub-classification of the public utilities enumerated in Section 39 thereof, as aforesaid, by which it imposes an excise tax upon railroad companies and pipe line companies, computed by taking four per cent. of their intrastate earnings, and imposes upon all other public utilities mentioned in said Section 39 a similar excise tax computed by taking one and two-tenths (1.2 per cent. of their gross receipts upon intrastate business, excepting express and telephone companies, as to which the tax is computed by taking two (2) per cent. of such gross earnings; that said sub-classification is unreasonable, arbitrary, unjust, and unjustly and unduly discriminatory as against railroad companies, and is not based upon nor in proportion to their several abilities to pay said tax or the respective values of the privileges taxed; that the value of the privileges upon which the 1.2 and 2 per cent. taxes are imposed are and have been and will be equal to or greater than the value of the privileges upon which four per cent. tax is imposed, and are not otherwise taxed by said Act or
12 by any other law whatsoever. The pipe line companies and railroad companies, including the plaintiff, upon which said four per cent. tax is imposed by said Act, must compete and continue to compete with said utilities upon which the 1.2 and 2 per cent. taxes are imposed, in the money markets, for the securing of funds necessary to the establishment, betterment, and maintenance of their respective properties. And by reason of the arbitrary and discriminatory sub-classification aforesaid, said utilities subject to the four per cent. tax, including the plaintiff, are placed at a great and constant disadvantage and subjected to an unjust and unreasonable discrimination in perfecting and maintaining their several financial arrangements. Said railroad companies also in many instances

are forced to compete for traffic with interurban railroads, upon which a tax of but 1.2 per cent. is imposed, and by reason of said sub-classification said interurban railroads are placed in a position of unfair and unreasonable advantage over said railroads, and said railroads and particularly the plaintiff, are subjected to an unreasonable and unjust discrimination against them and in favor of said interurban railroads. Said sub-classification is unjustly and unduly unequal in its operation, and by reason thereof said sub-classification and said four per cent. excise tax based thereon are invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

30. Plaintiff further says that the percentage of gross earnings from intrastate business to total gross earnings varies very widely among the railroads operating in said State, and will continue
13 to do so; that in the case of the small local roads, to which class plaintiff belongs, this percentage is high, and the four per cent. tax represents a much greater relative deduction from their total gross earnings than is true in the case of the large interstate railroads; that the cost of conducting local and intrastate business is much greater than the cost of conducting through and interstate business, and such local business is therefore much less profitable.

31. Plaintiff further says that the value of the privilege of carrying on their intrastate business is of much less value to said small local roads, and particularly to the plaintiff, than is the value of conducting their intrastate business to the large interstate lines; that the aforesaid differences in cost and in value are and have been matters of common knowledge and general recognition; that as between the several railroads operating in Ohio, said four per cent. tax is grossly unjust and unreasonable and discriminatory as against the plaintiff and other roads similarly situated, and places them at a serious disadvantage in competing with the roads upon which said tax bears so much less heavily, as aforesaid.

32. Plaintiff further says that said four per cent. tax is arbitrary, unreasonable, and unduly and unjustly discriminatory against the plaintiff, and grossly unequal in its operation as against the plaintiff; that by reason thereof said tax is invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

33. Plaintiff further says that for several years prior to the passage of the Act of May tenth, 1910, aforesaid, the State had at-
14 tempted to levy an excise tax for the privilege of carrying on their respective lines of business within this State, computed by taking one per cent. upon all their gross earnings of the several public utilities names in Section 39 of said Act of May thirty-first, 1911; that some of said public utilities, principally railroads and pipe line companies, were engaged in interstate commerce, and it appearing that said one per cent. tax was therefore invalid,

as in violation of the commerce clause in the Federal Constitution, said Acts of May tenth, 1910, and May thirty-first, 1911, were enacted, by which it was attempted as to railroads and pipe line companies to increase the percentage to four per cent. and limit its application nominally to intrastate commerce;—the percentage as to other utilities being left practically unchanged; that said increase of said tax to four per cent. was intended to be and was and is an attempt to discriminate against utilities engaged in interstate commerce and to levy a tax upon interstate commerce and to regulate the same, and that by reason thereof said four per cent. tax is invalid and in violation of the commerce clause of the Federal Constitution.

34. Plaintiff further says that under Section 47 of said Act of May thirty-first, 1911, said Commission is required to ascertain and assess at its true value in money, all the property in this State of each public utility subject to the Act, including railroads; that by reason thereof said Commission assessed all the property in this State of the plaintiff; that by reason thereof said four per cent. tax is in reality a double tax on plaintiff's property, and is in effect and in fact a property tax, lacking uniformity and equality, and is unequal and unjust and in violation of the State and Federal Constitutions.

35. Plaintiff has asked said Commission for relief, but without effect.

36. Plaintiff further says that by reason of the premises the tax which will be assessed against plaintiff, unless the Commission is restrained from certifying the amount determined by it as plaintiff's gross receipts as aforesaid, is unconstitutional, invalid and void; that nevertheless, if said tax is so certified, plaintiff will be compelled to pay the same or else incur the pains and penalties prescribed in said Act as aforesaid, and if it does not pay said tax then its articles of incorporation will be cancelled and its corporate franchises destroyed and its right to be a corporation terminated, and it will be prevented from further serving the public as a common carrier in either intrastate or interstate commerce, and its property will be wrongfully seized for the payment of said tax; and plaintiff's real estate will be subjected to a lien for the amount of said tax and the penalty thereon, and the plaintiff's title thereto will be clouded thereby, and plaintiff will be subjected to numerous harrassing and vexatious suits.

37. Plaintiff further says that it will be impossible to secure an adjudication as to the validity of said tax within the period named in Section 120 of said Act, by interposing such invalidity as a defense to any suit that might be brought for its collection or enforcement; that the purpose and necessary effect of the several provisions of said Act is to compel the plaintiff to pay said illegal and void tax or to forfeit all its charter rights and franchises and to have its corporate existence destroyed, and this is its only opportunity for injunction relief.

38. Plaintiff further says that Section numbered 33 of said Act attempts to prevent any judicial examination of the validity of said Act or any judicial construction of its meaning.

16 39. Plaintiff further says that by reason of the premises said excise tax is confiscatory of its property, and if enforced against plaintiff will take its property without due process of law, and will deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

40. Plaintiff further says that the damages it will suffer in the premises are irreparable, and that it has no adequate remedy at law.

All the matters and things in this bill of complaint set forth as to the actions, doings and intentions of the defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of the plaintiff.

In consideration whereof and for as much as the plaintiff is remediless in the premises at and by the strict rules of common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable, plaintiff prays your Honors to grant unto it a writ of subpœna, to be directed to each of the defendants herein, commanding them, in conformity with the practice of this Honorable Court, to appear herein and answer this bill of complaint, (but not under oath, an answer under oath being expressly waived), and also that the defendants and each of them, their servants, agents and employés, be temporarily enjoined from certifying to the Auditor of State of Ohio, said sum of one hundred and sixty six thousand, three hundred and forty dollars ($166,340), or any part thereof, or any other sum or sums whatever, as the amount of the gross earnings of the plaintiff for the year ending on the thirtieth day of June, 1911, for business done within this State, and from making any certification whatsoever to said Auditor of State for or in connection with or as a basis for any excise

17 tax upon the plaintiff, for the privilege of carrying on its intrastate business, and from taking or authorizing any action against plaintiff in connection with said tax; and that upon final hearing, said injunction be made perpetual and permanent and said tax decreed to be void; that a temporary restraining order issue forthwith, and for all such other relief as plaintiff may in equity be entitled to, and as to this Honorable Court may seem meet; and plaintiff will ever pray.

ROB'T J. KING,
Solicitor for Plaintiff.

STATE OF OHIO,
Franklin County, ss:

W. C. Mooney, being duly sworn, deposes and says that he is the treasurer of the plaintiff, The Ohio River and Western Railway Company, which is a corporation, and its officer and agent duly authorized in the premises; that he has read the foregoing bill of complaint, and that the facts stated therein are true, except such as are therein said to be upon information and belief, and as to such facts affiant verily believes them to be true.

W. C. MOONEY.

Sworn to before me and subscribed in my presence, this 4" day of November, 1911.

[SEAL.] C. P. WHITE, JR.,
Deputy Clerk, U. S. Circuit Court, S. D. O.

Endorsed: Let restraining order issue until 10 A. M. Nov. 11, 1911, at which time cause to be heard on application for temporary injunction; but if for cause case is not heard at above named hour restraining order to continue in force until ruling of court on application for temporary injunction. Bond to be given in sum of $8,000.00. Nov. 4, 1911. J. E. Sater, J.

18 And afterwards, to wit: on the 4th day of November, A. D. 1911, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court, its certain Motion in this cause, which said Motion is clothed in the words and figures following, to wit:

Motion.

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Motion.

Now comes the plaintiff and moves the Court for a temporary restraining order herein.

ROB'T J. KING,
Solicitor for Plaintiff.

19 And afterwards, to wit: on the 4th day of November A. D. 1911, an Entry was made upon the Journal of said Court in said cause, which said Entry is clothed in the words and figures following, to wit:

Entry (Temporary Restraining Order Granted).

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

R. M. DITTEY, F. E. MUNN and CHR. PABST, as The Tax Commission of Ohio, and THE TAX COMMISSION OF OHIO, Defendants.

Journal Entry.

This day this cause came on to be heard upon the application of the plaintiff for a temporary restraining order herein, the defendant having been duly notified of the application therefor, and was argued by counsel for plaintiff and defendants, on consideration whereof the court, being fully advised in the premises, finds that said temporary restraining order should be granted, as prayed for.

It is, therefore, ordered, adjudged and decreed that upon giving bond in the sum of $8,000.00, with surety approved by the Court, the defendants and each of them, their servants, agents and employés, be and they are hereby restrained until the further order of this Court as hereinafter stated, from certifying to the Auditor of State, the sum of one hundred and sixty six thousand, three hundred and forty dollars, or any part thereof, or any other sum or sums whatsoever, as the amount of gross earnings of the plaintiff for the year ending on the thirtieth day of June, 1911, for business done within this State; and from making any certification whatsoever to said Auditor for or in connection with or as a basis for any excise tax upon the plaintiff for the privilege of carrying on its intrastate business, and from taking or authorizing any action against plaintiff in connection with said tax. This order shall be in full force and effect until 10 A. M., Nov. 11, 1911, at which time this cause to be heard on application for temporary injunction; but if for cause case is not heard at above named hour this restraining order shall continue in force and effect until this court shall rule on application for temporary injunction.

And afterwards, to wit: on the 4th day of November, A. D. 1911, there was filed in the Clerk's Office of said Court a certain Bond on the Restraining Order in this cause, which said Bond is clothed in the words and figures following, to wit:

Restraining Order Bond.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Restraining Order Bond.

Know all men by these presents: that The Ohio River and Western Railway Company and W. C. Mooney — held and firmly bound unto Robert M. Dittey, Frank E. Munn and Christian Pabst as The Tax Commission of Ohio and The Tax Commission of Ohio in the sum of eight thousand dollars to the payment of which they bind themselves, heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this 4th day of November, A. D. 1911.

The condition of the above obligation is such, that Whereas, The Ohio River and Western Railway Company a citizen of the
21 State of Ohio having filed on the Chancery side of the Circuit Court of the United States for the Southern District of Ohio, a Bill against the said Robert M. Dittey, Frank E. Munn and Christian Pabst as The Tax Commission of Ohio and The Tax Commission of Ohio and having obtained an allowance of a temporary restraining order, as prayed for in said Bill, from certifying to the Auditor of the State of Ohio, the sum of $166,340, or any part thereof or any other sum or sums whatsoever as the amount of the gross earnings of said Company for the year ending June 30, 1911 and from making any certification whatever to said auditor for or in connection with or as a basis for any excise tax on said Co. for the privilege of carrying on its intra-state business and from taking or authorizing any action against said Company in connection with said tax.

Now, if the said The Ohio River and Western Railway Company shall abide the decision of said Court and pay all moneys and costs which shall be adjudged against it in case the said restraining order shall be dissolved, then these presents shall be void, otherwise to remain in full force.

THE OHIO RIVER AND WESTERN
RAILWAY COMPANY, [SEAL.]
By W. C. MOONEY, *Its Treasurer.*
W. C. MOONEY. [SEAL.]

Signed and sealed in presence of
C. P. WHITE, JR.
A. M. SPARKS.

Approved,
J. E. SATER, *J.*

22 Thereupon there was issued out of the Clerk's Office of said Court, our certain Temporary Restraining Order in this cause, directed to the Marshal of said District and against said De-

fendant which said Temporary Restraining Order is clothed in the words and figures following, towit:

Temporary Restraining Order.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, ss:

The President of the United States of America to Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Greeting:

Whereas The Ohio River and Western Railway Company, a corporation, etc., citizen of the State of Ohio has filed on the Chancery side of the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, a bill against Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, and has obtained an allowance for a Temporary Restraining Order, as prayed for in said Bill.

Now, Therefore, we having regard to the matters in said Bill contained, do hereby command and strictly enjoin you, the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, your servants, agents and employés, from certifying to the Auditor of State, the sum of one hundred and sixty six thousand, three hundred and forty dollars, or any part thereof, or any other sum or sums whatsoever, as the amount of gross earnings of the plaintiff for the year ending on the thirtieth day of June, 1911, for business done within this State; and from making any certification whatsoever to said
23 Auditor for or in connection with or as a basis for any excise tax upon the plaintiff for the privilege of carrying on its intrastate business, and from taking or authorizing any action against plaintiff in connection with said tax. This order shall be in full force and effect until 10 A. M. Nov. 11, 1911, at which time this cause to be heard on application for temporary injunction; but if for cause case is not heard at above named hour this restraining order shall continue in force and effect until this court shall rule on application for temporary injunctiin. Which commands and injunctions you are respectively required to observe and obey, until our said Circuit Court shall make further order in the premises.

Hereof fail not, under the penalty of the law thence ensuing.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 4th day of November, A. D. 1911, and in the 136" year of the Independence of the United States of America.

[SEAL.]

B. E. DILLEY,
Clerk U. S. Circuit Court, S. D. O.,
By C. P. WHITE, Jr., *Deputy.*

Thereupon there was issued out of the Clerk's Office of said Court, our certain Subpœna in this cause, directed to the Marshal of said District and against said defendant which said Subpœna is clothed in the words and figures following, towit:

Subpœna.

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, ss:

24 The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are hereby commanded to summon Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, citizens of and resident in the State of Ohio, if they be found in your District, to be and appear in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, aforesaid, at Columbus, on the first Monday in January next, to answer a certain Bill in Chancery, filed and exhibited in said Court, against them by The Ohio River and Western Railway Company, a corporation, etc., citizen of and resident in the State of Ohio.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 4th day of November, A. D. 1911, and in the 136th year of the Independence of the United States of America.

Attest:

[SEAL.] B. E. DILLEY, *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the Clerk's Office of said Court on or before the first Monday of December, 1911, otherwise the said bill may be taken pro confesso.

B. E. DILLEY, *Clerk.*

25 And afterwards, towit: on the 9th day of November, A. D. 1911, came the Marshal of said District to whom the said writ was in form aforesaid directed and returned the same into the Clerk's Office of said Court with his proceedings endorsed thereon, clothed in the words and figures following, towit:

Marshal's Return (Restraining Order).

Received this writ at Columbus, Ohio, on November 6, 1911, and on the same day I served the within named Robert M. Dittey, Frank E. Munn and Christian Pabst, as the Tax Commission of Ohio, by delivering to each a true copy of this writ, with the endorsements thereon, at Columbus, Ohio, by handing same to each personally, at Columbus, Ohio.

And on November 6, 1911, I served the within named The Tax Commission of Ohio by delivering a true copy of this writ, with the endorsements thereon, to Robert M. Dittey, Chairman of said Commission, by handing same to him personally, at Columbus, Ohio.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
By O. V. SHILLING, *Deputy.*

Total Fees $9.20.

And afterwards, towit: on the 9th day of November, A. D. 1911, came the Marshal of said District to whom the said writ was in form aforesaid directed and returned the same into the Clerk's Office of said Court with his proceedings endorsed thereon, clothed in the words and figures following, towit:

Marshal's Return (Subpœna.)

Received This Writ on the 6th day of November, A. D. 1911, and on the 6th day of November, A. D. 1911, I served the within named Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, by delivering a true copy of this writ,
20 with the endorsements thereon, to each of them, by handing said copy to each personally, at Columbus, Ohio. And on the 6th day of November, A. D. 1911, I served the within named The Tax Commission of Ohio, by delivering a true copy of this writ, with the endorsements thereon, to Frank M. Dittey Chairman of said Commission, by handing said copy to him personally, at Columbus, Ohio.

EUGENE L. LEWIS, *Marshal,*
By O. V. SHILLING, *Deputy.*

Fees: $9.32.

And afterwards, towit: on the 11th day of November, A. D. 1911, an Entry was made upon the Journal of said Court, in said Cause, which said Entry is clothed in the words and figures following, towit:

Entry (Restraining Order to Continue in Force).

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

No. —.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, Plaintiff,
vs.
ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as THE Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Journal Entry.

For cause duly shown, the plaintiff's application for a temporary injunction herein is not heard at ten A. M., November eleventh, 1911, accordingly the restraining order heretofore issued herein continues in force and effect until this Court shall hear and rule upon such application for a temporary injunction.

27 And afterwards, towit: on the 23rd day of July, A. D. 1912, an Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

Entry (Leave to File Demurrer).

No. 1593.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, Plaintiff,
vs.
ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Entry.

Upon application and for good cause shown leave is granted the Defendants to file their demurrer in this cause, and same is accordingly filed.

And afterwards, towit: on the 23rd day of July, A. D. 1912, came the Defendants, by their Attorneys and filed in the Clerk's Office of said Court, their certain Demurrer in this cause, which said Demurrer is clothed in the words and figures following, towit:

Demurrer.

In the District Court of the United States, Southern District of Ohio, Eastern Division.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Demurrer of the Above-named Defendants, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio to the Bill of Complaint of the Above-named Plaintiff.

The defendants by protestation not confessing or acknowledging all or any of the matters of things in said Bill of Complaint contained to be true, in such manner and form as the same are therein set forth and alleged, do demur to the said Bill and to each and every paragraph thereof. And for cause of demurrer show that it appears by the plaintiff's own showing by the said Bill that
28 it is not entitled to the relief prayed by the Bill against these defendants.

Wherefore, and for divers other causes of demurrer appearing from said Bill, these defendants do demur thereto, and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said Bill, and they humbly pray to be hence dismissed with the reasonable costs in this behalf sustained.

TIMOTHY S. HOGAN,
Attorney General of Ohio, Solicitor for the Defendants, State House, Columbus, Ohio.

CLARENCE D. LAYLIN,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

TIMOTHY S. HOGAN,
Attorney General of Ohio, Solicitor for the Defendants.

STATE OF OHIO,
Franklin County, ss:

Robert M. Dittey, being duly sworn, deposes and says that he is a member of and Chairman of The Tax Commission of Ohio, and is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay.

ROBERT M. DITTEY.

Sworn to before me and subscribed in my presence this 20th day of July, A. D. 1912.

[SEAL.] A. J. SMART,
Notary Public Within and for Franklin County, Ohio.

29 And afterwards, towit: on the 5th day of October, A. D. 1912, an Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

Entry (Case Set for Hearing Nov. 26, 1912).

United States District Court, Southern District of Ohio, Eastern Division.

THE OHIO & WESTERN RAILWAY COMPANY, Complainant,
vs.
THE TAX COMMISSION OF OHIO, Defendant.

Order.

The complainant having filed in this Court its bill against the defendant and the members thereof, alleging that the Act under which said Tax Commission is operating is in certain respects unconstitutional and praying for a permanent injunction on the final hearing, and has also applied for an interlocutory injunction pending such hearing,

Now therefore, in pursuance of Section 266 of the Judicial Code of the United States, I do hereby call to my assistance, for the purpose of hearing and determining such application and such case on its merits, if counsel be ready thus to present the same, the Honorable John W. Warrington, United States Circuit Judge for the Sixth Judicial Circuit, and the Honorable William L. Day, United States District Judge for the Northern District of Ohio,—such hearing to be had in the Court Room in the Federal Building at Columbus, Ohio, on November twenty-sixth, 1912, at ten o'clock a. m.

It is further ordered that counsel for the respective par-
30 ties to such action be present, to present such case at the time above named on the application for an interlocutory injunction or on the merits, as they may elect and circumstances permit.

J. E. SATER,
United States District Judge.

And afterwards, towit: on the 15th day of February, A. D. 1913, there was filed in the Clerk's Office of said Court, a certain Opinion in this cause, which said Opinion is clothed in the words and figures following, towit:

31 *Opinion.*

United States District Court, Southern District of Ohio, Eastern Division.

No. 1593.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and the Tax Commission of Ohio, Defendants.

No. 1600.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

On Plaintiff's Application for Interlocutory Injunction and Defendants' Demurrer.

Before Warrington, Circuit Judge, and Sater and Day, District Judges.

PER CURIAM:

Jurisdiction of these cases is vested in this Court through the presence of certain federal questions, no matter how it shall be found necessary to decide them or whether to decide them at all. Siler v. Louisville & Nashville R. R. Co., 213 U. S., 175; Mich. Cent. R. R. Co. v. Vreeland, decided by U. S. Supreme Court, January 20, 1913; L. & N. R. Co. v. Siler, 186 Fed. Rep., 176.

32 The plaintiff in each of the cases is an Ohio corporation, whose line of road lies wholly within the state. In each case the plaintiff challenges the constitutionality of certain sections of the Act of May 31, 1911, 102 Ohio L., 224-260, creating a tax commission and providing for a system of taxation, and imposing a sum which the Act recites is in the nature of an excise tax upon the privilege of carrying on intra-state business. A restraining order having been granted in each case, the respective plaintiffs seek a temporary injunction. The defendants, who are certain state officers and members of the tax commission, demur to each of the bills. The cases are for hearing on the plaintiff's application for an interlocutory injunction and upon the demurrers of the defendants.

The law under consideration is a re-enactment of the Act of March 10, 1910. Its history is contained in the brief filed in behalf of the State, but its development need not be traced. The Act raises the rate of the so-called excise taxation on certain utilities, substitutes a tax commission for a board of appraisers and assessors, assembles the various tax laws of the state and incorporates them into one measure.

The term "public utility," as used in the Act and as defined in Sec. 39, means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, referred to in such section,—a railroad company being one of the many kinds of companies therein mentioned,—and includes also any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations. By the provisions of Sec. 40, any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, when engaged in the business of operating a railroad, either wholly or partially within the state, on rights of way acquired and held exclusively by such company, or otherwise, is a railroad company.

Section 42 defines the term "gross earnings"

"to mean and include the entire earnings for business done by any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

Sec. 83 requires a statement to be filed by each railroad company with the Tax Commission containing the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the 30th day of June next preceding, from whatever source derived, for business done within the state, excluding therefrom, however, all earnings derived wholly from interstate business or business done for the federal government. The statement must also contain the total gross earnings of such company for such period from business done within the state. By the terms of Sec. 97, the Auditor of State in the month of November is required to charge for collection against each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intra-state business. The amount so charged is four per cent, and is computed on the gross earnings, as fixed and reported to him by the Commission, of the company's intra-state business for the year covered by its annual report to such Commission, but the tax shall not be less than ten dollars in any case. The various public utilities

named in the Act are classified. The percentage charged for
34 collection as an excise tax for the privilege of carrying on intra-state business is the same as to all utilities falling within any given class, but varies as among different classes. The tax imposed for instance on railroad companies for such privilege is, as we have seen, four per cent. of the gross earnings of their intra-state business, to the exclusion of the earnings derived wholly from interstate business and business done for the federal government (Sections 46, 72, 83, 88, 93, 97), while that assessed for a like purpose against the similar earnings of street, suburban and interurban railroad companies is but 1.2%, and of express and telegraph companies 2%.

While the mere declaration of the General Assembly that the tax is an excise tax does not make it so, if it is apparent that it cannot be consistently so designated, nevertheless the declaration of the law-making body is entitled to much weight. Flint v. Stone Tracy Co., 220 U. S., 107; 145. In view of the decisions, state and federal, it is plain that the tax in question is an excise tax on the doing of corporate intra-state business, the gross intra-state business being the yardstick or measure of taxable value. Southern Gum Co. v. Laylin, 66 Ohio St., 578; State v. Ferris, 53 Ohio St., 314; Ashley v. Ryan, 49 Ohio St., 504; Western Union Telegraph Co. v. Mayer, 28 Ohio St., 521; Express Co. v. State, 55 Ohio St., 69; Adler v. Whitbeck, 44 Ohio St., 539; Thomas v. U. S., 192 U. S., 363; Cooley, Const. Lim., 6th ed., 608.

Each plaintiff contends that, because it is unable to earn upon its investment a reasonable profit attributable to intra-state business, it possesses no privilege worth four per cent. of its gross intra-state earnings and that such a tax is as to it both confiscatory and discriminatory. The Ohio River & Western Railway Company
35 alleges that a tax of four per cent. of its gross intra-state earnings is excessive, because, though carefully managed, it does not produce, without the imposition of such tax, a profit equal to the return upon high grade investments at all times available in the money market. The Marietta, Columbus & Cleveland Railway Company charges that it is actually operated at a loss. Are the plaintiffs or either of them for the reasons stated exempt from the excise tax in question? It was held in State v. Ferris, p. 341, and is conceded by the plaintiffs, that the first section of the fourteenth amendment to the constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws" is no broader than the second section of the Ohio bill of rights, and that therefore a statute relating to an excise tax authorized by the bill of rights would not conflict with such section of the constitution of the United States; but the plaintiffs, to maintain their contention, point to the following language in Southern Gum Co. v. Laylin, pp. 578, 594:

"But upon the power to tax privileges and franchises there is no express limitation in the constitution, but certain limitations upon that power must be implied from other provisions of the constitution, so as to make the whole instrument harmonious and con-

sistent throughout. The constitution was established to 'promote our common welfare.' Preamble to the Constitution. Government is instituted for the equal protection and benefit of the people. Section 2 of the Bill of Rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section 19 of the Bill of Rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. Ashley v. Ryan, 49 Ohio St., 504, State v. Ferris, 53 Ohio St., 314, and Hagerty v. State, 55 Ohio St., 613, are examples of taxing the privilege or franchise conferred; while Telegraph Co. v. Mayer, 28 Ohio St., 521, and Express Co. v. State, 55 Ohio St., 69, are examples of taxing the continued value of the existing privilege or franchise from year to year.

36 These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot be extended beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rest largely in the General Assembly, but finally in the courts."

An examination of that case as reported, as well as of the original file papers, discloses that no contention was made and no issue tendered that the statute then under consideration imposed a tax beyond the reasonable value of the privilege or franchise originally conferred or its continued value from year to year, nor do any of the cases cited in the above quoted excerpt touch that question. The limitation thus said to be imposed by the state constitution on the legislative power to tax cannot, however, be safely treated as a dictum, for the reason that it is carried forward into the syllabus, which in Ohio states the law of the case. The Court dealt in that case with a general law and its operation on all corporations of given classes throughout the state, and not with its operation on specific financially weak corporations of any one of those classes. It did not consider the same question as is here presented, and we are constrained to believe that it did not mean to hold that the courts, as final arbiters, may overthrow a law which imposes a tax on privileges and franchises merely because in isolated cases such law imposes a hardship, but that it had reference to a law the effect of whose enforcement is to produce that result generally. This is made clear by the same court in State v. Guilbert, 70 Ohio St., 253, where it is said:

"We are of the opinion that an excise tax which operates uniformly throughout the state and applies equally to all the subjects embraced within its terms, cannot be said to deprive any of the equal protection of the law, or in any manner to violate the bill of rights, or any section of the constitution."

The earlier case of Western Union Telegraph Co. v. Mayer, 28 Ohio St., 521, is also instructive. A law of uniform operation,

37 which imposed an excise tax at a rate equal to that on property, on the gross receipts of foreign express and telegraph companies doing business in Ohio and prohibited, under heavy pen-

alties, any person from acting as agent of or transacting any business for any company that defaulted in the payment of such tax, was alleged to be violative of both the state and federal constitution. The tax was a charge on the privilege of such corporations exercising their franchises and powers within the state until the tax, interest and penalties thereon were fully paid. It was computed on the gross receipts arising manifestly not only from distinctively intra-state business, but from business which began elsewhere and terminated within the state, or had its inception in the state and terminated beyond its limits. Thus reckoned, the amount was 3.34% of such receipts, but if restricted as it should have been to the purely intra-state business, it equalled 31.2% of the total receipts from that source, or 93.6% of such receipts not absorbed by current expenses. It was charged that the tax was oppressive and unjust in its operation, but the tax was upheld, it being stated in the opinion regarding its provisions that—

"They are the conditions upon which corporations named in the act are allowed to do business within the state. Whether this tax is warranted by a wise public policy, or whether it is too onerous, are questions for the legislature and not for the courts. The burden is the price paid for transacting their business within the state. Any regulations imposed on such corporations, not amounting to a regulation of commerce, nor a tax on the property of the corporation within the state, imposed as a compensation to be paid to the state for the privilege of doing business within its territory, is, we think, within the legislative power of the general assembly. The unbroken current of judicial authority is in support of such power in the state, and in our opinion public policy demands its exercise."

The Court, it is true, was speaking of a law affecting foreign corporations only which could exercise none of their powers or franchises within the state, save through comity or under legislative consent, and which the court found might have been excluded
38 from the state altogether, with which theory we have nothing to do. But it is also true that it recognized the power to raise the necessary funds to defray the legitimate expenses of government by modes other than an ad valorem system of taxation on all property in the state and the legislative power to create domestic corporations and prescribe the terms upon which they, as well as foreign corporations, might exercise their franchises. The right to extend the tax to domestic corporations undoubtedly existed, as was later held in the Southern Gum Company case, but the legislature did not see fit to embrace such corporations within the law. It would therefore seem to follow that the language quoted is applicable to domestic as well as foreign corporations and that a law which, being of uniform operation, although it levied a charge almost equal to the entire net and distinctively intra-state profits of an individual corporation of a given class, is not, on that account, repugnant to any constitutional provision, state or federal.

Some assistance is derived from Adler v. Whitbeck, 44 Ohio St., 539, which arose under a law the authority for whose enactment is based both upon the constitutional provision (Schedule, Sec. 18,

Constitution of Ohio) that "no license to traffic in intoxicating liquors shall hereafter be granted in this state, but the General Assembly may by law provide against evils resulting therefrom," and the power of taxation granted in the same organic instrument. The law imposed a tax on the business of trafficking in intoxicating liquors and involved the exercise of both the police power (p. 563, and McGuire v. State, 42 Ohio St., 532) and the power to tax (pp. 562, 563, Anderson v. Brewster, 44 Ohio St., 583). It served a double purpose—the restraint of the evils resulting from the liquor traffic, and the creation of a revenue to indemnify the general taxpayer for the increased burden imposed on him by the business. The tax was said to be in the form and nature of a tax upon the business (p. 563), and in the Southern Gum Company case it is affirmatively characterized as an excise tax applied to the liquor traffic on account of the additional burdens imposed on the state. In this respect it is assimilated to the tax here under consideration, whose object is to compensate the state and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the government over corporate public utilities and for the benefit of those who own and operate such. Ashley v. Ryan, 49 Ohio St., 504, 525; Cincinnati Gaslight & Coke Co. v. State, 18 Ohio St., 238, 243; Baker v. Cincinnati, 11 Ohio St., 534, 543; Southern Gum Co. v. Laylin, p. 595; Western Union Telegraph Co. v. Mayer. The contention was made in the Adler case that the enforced payment of the tax on the business of trafficking in intoxicating liquors would impose on many of small means such financial hardship as to drive them out of business. The court recognized that such would be the consequence, but it did not deem the law invalid on that account (pp. 560, 561, 567), as such result would arise from extraneous circumstances and not from the law.

Equality in regard to taxation of property is the great idea of the Ohio Constitution. Baker v. Cincinnati, 11 Ohio St., 541. The legislature, conforming as nearly as may be to the purposes of the framers of the constitution, has intended to reach, for taxation, the property of every citizen, whatever its form may be, which is not by the organic law specifically exempt, to the end that all shall bear their just share of the public burdens. Lewis v. State, 60 Ohio St., 479; Southern Gum Co. v. Laylin, p. 598. There can be no exemption of property from taxation, unless the right of exemption is clearly expressed. Lander v. Burke, 65 Ohio St., 532, 542. The estate of an insolvent decedent must contribute, and to the same relative extent as a prosperous enterprise or the estate of a wealthy decedent. Sec. 2784, R. S.; McNeill v. Hagerty, 51 Ohio St., 255, 265. The creditors of an insolvent's estate really pay the tax, just as the bondholders and other creditors of the money losing plaintiff, under the rule of equality, in fact must do, if it be required to pay the excise tax charged against it. But absolute equality and uniformity is not attainable under the Ohio or any other system of taxation. An approximation thereto is all that is practicable. Shotwell v. Moore, 45 Ohio St., 646; Ashley v. Ryan,

49 Ohio St., 525, 526. Judge Cooley, in his work on Taxation, 3rd ed., 390, 391, with great force and accuracy, in speaking on this subject, says:

"It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws. While equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical. * * * The legislature must judge of the general result, and when the law has apportioned the tax, individual hardships must be regarded as among the inconveniences which are incident to regular government. The same necessity that justifies any taxation will justify and sustain any reasonable provisions for giving it effect. The necessity of the state and of reasonable provisions for the security of the individual must be equally considered; the state is no more to be deprived of its revenue, because of individual hardships resulting from general rules, than is an individual to be stripped of his property without law, because in its necessity the state finds it more convenient to take it thus than by regular proceedings. The incidental hardship or inconvenience must be submitted to in either case."

The rule of non-exemption on account of the impracticability of absolute equality of taxation thus recognized by the state court and so clearly stated by Judge Cooley, was applied and enforced as to an excise tax in Marmet v. State, 45 Ohio St., 69, where Judge Spear, speaking for the court, held that absolute equality of
41 burdens, whether applied to taxes or other subjects of legislation, is not to be expected in our laws, and that the wisdom of man has not yet devised a system of equalizing burdens so perfect in its application and so thorough in its enforcement as to leave no room for adverse comment or criticism. An excise tax is not a tax on property, State v. Ferris, p. 326, Cincinnati Gaslight & Coke Co. v. State, p. 243, State v. Hipp, 38 Ohio St., 225, Ashley v. Ryan, 49 Ohio St., 504, 525, but it must, to be valid, operate with equality and uniformity, unaffected by any questions as to the solvency or insolvency of the person that is required to pay. That the rule announced in the Mermet case persists appears from Ashley v. Ryan, pp. 525, 526, and State v. Ferris. In the Ferris case, an inheritance tax law providing for an excise tax on the right to receive property was overthrown, because it violated the rule of equality and did not afford to all upon whom its provisions operated equal protection and benefit. It was said (pp. 337, 338):

"Our constitution requires equality in our tax laws, and also equality in their execution as near as may be. The only exemption allowed, as to taxation of property, is personal property to the amount of two hundred dollars to each individual, and certain other property devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the legislature has the

power to exempt personal property from taxation. The constitution must be regarded as consistent with itself throughout, and as section 2, of article 12, permits an exemption from taxation of personal property not exceeding two hundred dollars, a construction of section 2 of the bill of rights is thereby evinced to the effect that in taxation of subjects other than property, an exemption up to two hundred dollars in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the constitution, and it is this equality that is the pride and safeguard of us all."

The above announcement is in harmony with the utterances of the federal courts. In State Railroad T x Cases, 92 U. S., 42 575, a law was under consideration which imposed a tax on the franchise, capital stock, business and profits of the complaining corporations. One of the corporations was insolvent and in the hands of a receiver, its earnings not being sufficient to pay any of the interest on its bonded debt or anything beyond its necessary expenses for operation and repairs. Another of the companies met all of its expenses and interest on a large debt and declared large dividends. Each owned a large amount of tangible property and each possessed a franchise which it was held, as in Ashley v. Ryan, p. 525, to be valuable. They were both said to be alike subject to the law for the reason that insolvent corporations could no more escape taxation than insolvent individuals, many of whom pay taxes on realty which is mortgaged in excess of the value of all their property, both real and personal, the court adding that no state has ventured to establish the principle of permitting its visible tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts. In speaking of the insolvent company, Mr. Justice Miller said:

"Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling-stock and other tangible property? Is it supposed by any one that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town-lots and household furniture, and horses and carriages? The reason is too clear to

escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of
43 Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.

It is this franchise which the legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debts, who shall say that it is not worth $2,000,000? And who shall say that such is not the real value now of this franchise?

See also Flint v. Stone Tracy Co., pp. 165, 167, 168. We think it can be confidently asserted that the Supreme Court of Ohio meant by the language employed in the Southern Gum Company case that only those excise tax laws, the result of whose operation is generally confiscatory and oppressive, are unconstitutional, and that it did not intend to say that a law, general and uniform in its operation, is invalid, because in exceptional cases it may impose a hardship.

The General Assembly was empowered to impose a tax on the gross receipts of the respective plaintiffs, Western Union Telegraph Co. v. Mayer, pp. 531, 540, State v. Reinmund, 45 Ohio St., 214, Express Co. v. State, 55 Ohio St., 69, 77, State Tax on Ry. Gross Receipts, 15 Wall., 284, and direct the application of the tax when collected to purposes of general revenue or any other purpose authorized by law. Ashley v. Ryan, p. 525; State v. Ferris, p. 314; State v. Guilbert, p. 254. Both of the plaintiffs require governmental protection and the exercise of its supervisory power, and each should in justice bear its fair share of the government's burden. Were either of them to escape taxation on account of its exceptional condition, all other unprofitable corporate enterprises would likewise be relieved, and thus a practical system of taxation would be rendered impossible and the state be deprived of the power to meet its legitimate expenses.

44 The claim that the law in question is discriminatory in that (1) it does not include all public utilities engaged in business in Ohio, and (2) does not operate uniformly among the utilities named, is not supported by either the state or federal decisions. The inheritance tax law under consideration in Hagerty v. State, 55 Ohio St. 613, providing for exemptions in the amount of two hundred dollars, was assailed as discrimatory as among collateral kindred, the tax being imposed upon the value of the property received by some and not upon that received by others. The law was sustained because the power exercised by the general assembly in the enactment of the law was legislative and vested by the legislative grant as expressed in the first section of the second article of the constitution, and as the right to receive property by inheritance is

are guaranteed by the constitution, that instrument prescribes no limitation upon the power of the general assembly to designate the persons who may thus receive. The discrimination was based upon and held justified by the fact that there are degrees in collateral kinship. In commenting on that case in State v. Guilbert, the state court approved the language employed in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, regarding a similar law, that the states may tax the privilege of taking property by devise or descent, may discriminate between relatives, and between them and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions regarding uniformity and equality in taxation. In the Guilbert case, which also involved an inheritance tax law, the conclusion was reached (and we understand it to be the statement of a rule applicable to excise taxes) that——

"When it is determined, as was determined in the Ferris case * * * that the tax is an excise tax, and as in the Hagerty case * * * that the authority to impose the tax is conferred by the general grant of legislative power, then the selection of the subjects on which the tax will be imposed must be within the legislative competency."

45 Many illustrations may be found in the statutes and reported cases of the rule thus announced. In Marmet v. State, an ordinance was upheld imposing a license fee on the owners of all vehicles used upon the streets of Cincinnati excepting farmers marketing the products of their own farms. In the Adler Case, the tax on the business of trafficking in liquors was sustained, although it did not bring within its provisions the manufacture of intoxicating liquors or the sale of them by the manufacturer in quantities of one gallon or more at any one time. The line was drawn between the distillery and the brewery on the one hand and the saloon on the other. In Western Union Telegraph Co. v. Mayer, a corporation franchise tax imposed on foreign express and telegraph companies and on no other public utility companies, was sustained. Section 2780—17, Rev. St., imposed an excise tax for state purposes only of one per cent per annum upon the gross receipts of steam railroad, street and interurban railroad, express, telegraph and telephone companies when engaged in business either wholly or partially within the state, but it did not apply to water transportation companies unless the whole of their business was done within the state. Under the Nichols law (Sec. 2778*a*, R. S.), the property of express, telegraph and telephone companies was subjected to taxation, the value of such property being determined not merely by the consideration of the visible property, as in the case of all other corporations whose property is taxed, but by the value of the entire capital stock and by such other evidence and rules as will enable the boards fixing such valuation to arrive at the true value in money of the entire property of the companies in the state. A tax levied on such valuation was upheld in State v. Jones, 51 Ohio St. 492, and Adams Express Co. v. Ohio, 166 U. S., 185. Notwithstanding the establishment of the validity of that method of

taxation, it was not extended to any other corporations in the state.

The general assembly has seen fit to determine, in the enact-
46 ment of the law now before us, what occupations or lines of industry are public service enterprises and invested with those attributes which pertain to public interest or public service, but has exempted from the operation of the law, for instance, grain elevator companies, warehousing, stockyards, ferries, bridge companies and innkeepers, but it had a right so to do, and the selection made by it will not be disturbed by the courts unless the determination of the legislative body was clearly arbitrary. The law imposes no burden upon one class of utilities from which others similarly situated are exempt, and as it does not affect any right of the plaintiffs differently from that of others in the class to which they belong, it is not obnoxious to the constitution. Shell v. St. Ry. Co., 60 Ohio St., 269; State v. Guilbert, pp. 229, 245; 37 Cyc. 746. The same rule is recognized by the federal courts. In Kane v. Erie R. Co., 133 Fed. Rep., 681, 685, C. C. A. 6, in which a provision of an Ohio statute relating to railways was involved, it was said:

"The doctrine is well settled that the General Assembly, in the absence of an applicable prohibition, has power to classify subjects of legislation, conferring rights or imposing burdens on the created classes, according to its views of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be some reasonable ground for the classification made."

The rule so announced has been recognized in Magoun v. Illinois Trust & Savings Bank, supra, and in Home Ins. Co. v. New York, 134 U. S., 594, in each of which a statute was under consideration which involved an excise tax. Other cases in point are Kentucky Railroad Tax Cases, 115 U. S., 321; Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S., 232; Connolly v. Union Sewer Pipe Co., 184 U. S., 540; Brown-Forman Co. v. Kentucky, 127 U. S., 563; Southwestern Oil Co. v. Texas, 217 U. S., 114; Adams Express Co. v. Ohio, 165 U. S., 194, 228. The law is well expressed in
47 Bell's Gap Railroad Co. v. Pennsylvania (p. 237), where it is said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution."

In view of what has heretofore been said and authorities cited, it is clear that there is no merit in the contention that, because cer-

tain utilities of a given class pay one rate of tax and others of another class another rate, the law is wanting in uniformity of operation.

Another insistence is that the Act as applied to railroads lays a burden on interstate commerce. The tax by express provision is levied on gross intra-state earnings only. Those derived wholly from interstate business and business done for the federal government are specifically excluded in computing the amount to be paid. The rule announced in Ratterman v. Western Union Tel. Co., 127 U. S., 424, 425, is that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the state will be permitted to collect that arising upon the latter. As the gross intra-state earnings can be readily separated from all others, the law is not open to the objection urged. Ratterman v. Express Co., 49 Ohio St., 618; Express Co. v. State, pp. 69, 81; Western Union Tel. Co. v. Kansas, 216 U. S., 1, 31, 32, Kehrer v. Stewart, 197 U. S., 60, 67.

48 The further charge is made that, inasmuch as plaintiffs each pay a property tax, the tax provided by the Act in question is not permissible in that it denies them the equal protection of the law by subjecting them to double taxation. McNeill v. Hagerty, 51 Ohio St., 255, 268; Collett v. Springfield Savings Soc., 13 Ohio C. C., 131, 137. This cannot be true, because the exaction of four per cent of the gross intra-state earnings is not a property tax, but is an excise tax, the amount of which is fixed and measured by the amount of such earnings. Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same object within the same jurisdiction. Bradley v. Bauder, 36 Ohio St., 28, 35. The plaintiffs pay but one tax on property, and another as an excise tax. The taxation, therefore, is not double. Southern Gum Co. v. Laylin, p. 596.

The Act is also said to be unconstitutional in that it seeks to prevent judicial inquiry into its constitutionality and enforce obedience to its terms and the administrative acts thereunder, irrespective of their validity. To sustain this claim allusion is made to the provision for the recovery of a 15% penalty on unpaid taxes (Sec. 103), to the power to cancel the articles of incorporation of a delinquent corporation (Sec. 120), to the penalty imposed on any one who shall exercise or attempt to exercise any powers, privileges or franchises under the articles of incorporation after the same are cancelled (Sec. 120), to the power to enjoin the transaction of any business by any delinquent public utility (Sec. 123), to each day's wilful failure to observe and comply with any order or direction of the Tax Commission or to perform any duty enjoined by law which the Tax Commission is authorized to administer, constituting a separate and distinct offense (Sec. 158), and to the provision that the holding of any section or part thereof void and ineffective shall not affect any other section or part thereof (Sec. 160). We

49 are not concerned with the validity or operation of any of such sections for the reason that the pleadings tender no issue regarding them. Moreover, the penalties are clearly a separate

part of the Act, and whether collectible or not, may be determined in a case involving an attempt to enforce them. Flint v. Stone Tracy Co., p. 177; Willcox v. Consolidated Gas Co., 212 U. S., 53, 54.

We have noticed such objections as are made to the constitutionality of the law, as it is deemed necessary to consider. We do not find the statute to be obnoxious to either the state or the federal constitution.

It follows that the motion for an interlocutory injunction in such case must be denied. However, the questions involved are of such importance, that we assume that a review of our conclusions will be desired by the plaintiffs, pursuant to the special provision found in Sec. 266, Judicial Code, Act of March 3, 1911, 36 Stat., 1162.

We have accordingly concluded that the restraining orders heretofore granted shall be continued until an opportunity has been given for the plaintiffs to secure a review, and subject to conditions which will be prescribed in the order to be entered.

That the right of appeal directly to the Supreme Court from our decision may not be embarrassed, we refrain at the present time from passing upon the demurrers.

J. W. WARRINGTON,
U. S. Circuit Judge.
J. E. SATER,
U. S. Dist. Judge.
WILLIAM L. DAY,
U. S. District Judge.

50 *Entry (Injunction Refused, etc.).*

And afterwards, towit: on the 13th day of June, A. D. 1913, an Entry was made upon the Journal of said Court in said cause, which said Entry is clothed in the words and figures following, towit:

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Entry.

The plaintiff herein having made application for an interlocutory injunction herein suspending or restraining the enforcement and operation and execution of certain statutes of the State of Ohio by restraining the action of certain officers of said State, defendants herein, in the enforcement and execution of such statutes, and such application having been presented to the Honorable John E. Sater, District Judge of said Court, in chancery sitting, and said District

Judge thereupon having immediately called to his assistance to hear and determine said application, two other Judges of said Court, towit, the Honorable John W. Warrington, Circuit Judge of said Court, and the Honorable William L. Day, District Judge of said Court, and more than five days' notice of the hearing of said application having been given to the Governor and to the Attorney General of said State of Ohio and to the defendants herein, said application for an interlocutory injunction came on to be heard before and by said three Judges of said Court, upon the verified bill of complaint of the plaintiff, the facts averred in which said bill of complaint were by the defendants, for the purpose of said application for an interlocutory injunction, and not otherwise, admitted to be true, and was argued by counsel for plaintiff and defendants; on consideration whereof the said Court, said three Judges sitting therein as aforesaid and concurring, find that said application for an interlocutory injunction is not well taken; and it is by
51 the Court ordered that said interlocutory injunction asked for by the plaintiff as aforesaid be and it is hereby denied; to which finding of said Court and the denying of said interlocutory injunction plaintiff excepts. And the plaintiff thereupon gives notice of its intention to appeal from said order denying said interlocutory injunction, direct to the Supreme Court of the United States; and thereupon the Court fixes the appeal bond in the sum of five hundred — ($500.00).

J. E. SATER, *D. J.*

Approved, this 27th day of May, 1913,

TIMOTHY S. HOGAN,
Attorney General, Attorney for Defendants.
CLARENCE D. LAYLIN,
FRANK DAVIS, Jr.,
Of Counsel.

Petition for Appeal, With Order Allowing Same Endorsed Thereon.

And afterwards, towit: on the 25th day of June, A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court, its certain Petition for Appeal, with Order allowing same endorsed thereon, in this cause, which said Petition for Appeal is clothed in the words and figures following, towit:

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Petition for Appeal.

The above named plaintiff, The Ohio River and Western Railway Company, a corporation, conceiving itself aggrieved by the decree made and entered on the 13th day of June, 1913, in the above entitled cause, wherein and whereby said plaintiff was denied, after notice and hearing, an interlocutory injunction in said cause, suspending or restraining the enforcement, operation and execution of the statutes of the State of Ohio, by restraining the action of certain officers of said State, towit, the defendants herein, in the enforcement or execution of such statutes, does hereby appeal from said order and decree denying interlocutory injunction, as aforesaid, to the Supreme Court of the United States, for the rea-
52 sons specified in the assignment of errors which is filed herewith; and prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROB'T J. KING,
Attorney for Plaintiff.

Dated this 14th day of June, 1913.

The foregoing claim of appeal is allowed, and bond is fixed at $500.00.

Dated this 25th day of June, 1913.

J. E. SATER,
Dist. Judge.

And afterwards, towit: on the 25th day of June, A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court, its certain Assignment of Errors on Appeal in this cause, which said Assignment of Errors on Appeal is clothed in the words and figures following, towit:

Assignment of Errors on Appeal.

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Assignment of Errors on Appeal.

Plaintiff prays an appeal from the order and decree of this Court denying the plaintiff, after notice and hearing, an interlocutory, injunction in said cause, to the Supreme Court of the United States, and assigns for error:

58 First. The Court erred in refusing the plaintiff an interlocutory injunction against defendants, restraining the defendants Dittey, Munn and Pabst, as The Tax Commission of Ohio, from certifying to the Auditor of State the gross earnings of the plaintiff for business done within the State during the current year, and from making any certification whatsoever to said Auditor against plaintiff for the current year, for or in connection with or as a basis for the so-called "excise tax" provided for by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) and from taking or authorizing any action against plaintiff in connection with said tax.

Second. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the statutes of Ohio, (Act of May 31st, 1911, 102 Ohio Laws, 224,) upon the privilege of carrying on plaintiff's intrastate business for the current year, was wholly in excess of the value of that privilege, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and of the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Third. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the classifications and sub-classifications in the Ohio statutes providing for the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) were arbitrary, unreasonable, unduly and unjustly discriminatory against the plaintiff, and not a legitimate exercise of legislative power or discretion, thereby violating the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Sections 2 and 19 of the Bill of

54 Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fourth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes providing for the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) involved a discrimination against and imposed a burden upon interstate commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fifth. The Court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes imposing the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) are a regulation of and a burden upon foreign commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Sixth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) is in reality a double tax upon plaintiff's property, lacking uniformity and equality, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 2, Article 12, of the Constitution of Ohio, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

55 Eighth. The Court erred in holding that the guaranty against the imposition of a privilege tax greater in amount than the reasonable value of the privilege taxed, involved in the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, as interpreted and construed by the Ohio Supreme Court, particularly in the case of Southern Gum Company v. Laylin, Secretary of State, 66 Ohio State, 578, is appliable and operative only where the privilege tax is generally confiscatory and oppressive, and may not be invoked in individual cases wherein the tax exceeds the reasonable value of the privilege originally conferred or its continued annual value thereafter, and in consequently refusing relief by a temporary injunction from the current so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) on the privilege of carrying on its intrastate business, because it has not been shown that the tax in other instances, and generally, exceeded the reasonable value of the privilege taxed.

Ninth. The Court erred in holding the so-called excise tax imposed by the Ohio Statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224), to be an excise tax on the doing of corporate intrastate business.

Tenth. The Court erred in holding that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) might be regarded as an exercise of the police power of

the State, similar in its nature to that involved in the taxation of the business of trafficking in intoxicating liquors; and thereby saved from Constitutional infirmity.

Eleventh. The Court erred in holding that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) might be regarded as a legislative act to compen-
56 sate the State and indemnify the tax payer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the Government over corporate public utilities and for the benefit of those who own and operate such; and thereby saved from Constitutional infirmity.

Twelfth. The Court erred in holding that relief could not be afforded the plaintiff under the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, or the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, from the current so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) on the ground that in plaintiff's case such tax wholly exceeded the value of the privilege taxed, without at the same time declaring the said tax invalid in its entirety and throughout the field of its application, or, at least, as to all utilities classed with the plaintiff.

ROB'T J. KING,
Attorney for Plaintiff.

And afterwards, towit: on the 25th day of June, A. D. 1913, there was filed in the Clerk's Office of said Court a certain Bond in this cause, which said Bond is clothed in the words and figures following, towit:

Bond.

Know all men by these presents, that we, The Ohio River and Western Railway Company, as principal, and The Title Guaranty & Surety Co., as sureties, are held and firmly bound unto Robert M. Dittey, Frank E. Munn and Christian Pabst as The Tax Commission of Ohio, and The Tax Commission of Ohio, in the full and just sum of Five hundred Dollars, to be paid to the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, their certain at-
57 torneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of June, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a term of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said Court, between The Ohio River and Western Railway Company, and Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax

Commission of Ohio, a decree was rendered against the said The Ohio River and Western Railway Company, and the said The Ohio River and Western Railway Company having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, citing and admonishing them to be and appear at a session of the United States Supreme Court to be holden at the City of Washington.

Now, the condition of the above obligation is such, That if the said The Ohio River and Western Railway Company, shall prosecute its appeal to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue. Sealed and delivered in the presence of

THE OHIO RIVER AND WESTERN RAILWAY COMPANY,
By ROB'T J. KING, *Its Att'y.*

[SEAL.] THE TITLE GUARANTY & SURETY CO.,
By C. H. BANCROFT, *Att'y in Fact.*

Approved, by
J. E. SATER,
U. S. District Judge, S. D. O.

58 And afterwards, towit: on the 30th day of June, A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court its certain Precipe for Transcript in this cause, which said Precipe for Transcript is clothed in the words and figures following, towit:

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,
VS.
ROBERT M. DITTEY et al., Defendants.

Precipe.

To the Clerk:

You are requested to take a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript the entire record.

Respectfully,

ROB'T J. KING,
Attorney for Plaintiff.

Service of a copy of the foregoing precipe is hereby acknowledged, this twenty-fifth day of June, 1913.

TIMOTHY S. HOGAN,
Attorney General;
FRANK DAVIS, JR., &
CLARENCE D. LAYLIN,
Attorneys for Defendants.

59 THE UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, ss:

I, B. E. Dilley, Clerk of the District Court of the United States, within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and correct transcript of the record, as the same appears on file and of record in the Clerk's Office of said Court, in the therein entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Columbus, Ohio, this 30th day of June, 1913.

[Seal United States District Court, Southern Dis. of Ohio.]

B. E. DILLEY, *Clerk,*
By C. P. WHITE, JR., *Deputy.*

[Endorsed:] No. 1593. United States District Court, Southern District of Ohio, Eastern Division. The Ohio River and Western Railway Company v. Robert M. Dittey, et al. Transcript of Record.

60 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of Ohio, Eastern Division, and filed in the Clerk's office of said Court on the 25th day of June, A. D. 1913, in a case wherein The Ohio River and Western Railway Company, a corporation, is appellant, and you are the appellees, to show cause, if any, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John E. Sater, District Judge of said District Court, this 25th day of June, A. D. 1913.

J. E. SATER,
District Judge of the United States District Court for the Southern District of Ohio, Eastern Division.

Service of a copy of this citation is hereby admitted, this 25th day of June, A. D. 1913.

TIMOTHY S. HOGAN,
Attorney General, Solicitor for the said Appellees.

CLARENCE D. LAYLIN,
FRANK DAVIS, Jr.,
Of Counsel.

61 [Endorsed:] No. 1593. Citation. United States of America, ss. The President of the United States to Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio. Filed Jun- 25, 1913. B. E. Dilley, clerk.

Endorsed on cover: File No. 23,793. S. Ohio D. C. U. S. Term No. 642. The Ohio River and Western Railway Company, appellant, vs. Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and the Tax Commission of Ohio. Filed July 14th, 1913. File No. 23,793.

(23,794)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 643.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, APPELLANT,

vs.

DAVID S. CREAMER, TREASURER OF STATE OF THE STATE OF OHIO; EDWARD M. FULLINGTON, AUDITOR OF STATE OF THE STATE OF OHIO; TIMOTHY S. HOGAN, ATTORNEY GENERAL OF THE STATE OF OHIO; ROBERT M. DITTEY, FRANK E. MUNN, AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 At a stated term of the District Court of the United States within and for the Sixth Judicial Circuit and Eastern Division of the Southern District of Ohio, begun and held at the Court Rooms in the City of Columbus, on the first Tuesday of December, being also the third day of that month, in the year of our Lord One Thousand Nine Hundred and Twelve, and in the One Hundred and Thirty-seventh year of the Independence of the United States of America.

Present: The Hon. John E. Sater, District Judge.

Among the proceedings had were the following, to wit:

No. 1600.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as the Tax Commission of Ohio, and the Tax Commission of Ohio, Defendants.

Be it remembered that heretofore, to wit, on the 11th day of December, A. D. 1911, came the Plaintiff, and filed in the Clerk's Office of said Court, its certain Bill of Complaint in this cause, against said defendant, which said Bill of Complaint is clothed in the words and figures following, to wit:

Bill of Complaint.

In the United States Circuit Court for the Southern District of Ohio, Eastern Division.

2 In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as the Tax Commission of Ohio, and the Tax Commission of Ohio, Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States in and for the Southern District of Ohio, Eastern Division, in Chancery Sitting:

The Marietta, Columbus and Cleveland Railroad Company, a corporation duly organized under the laws of the State of Ohio, having

its principal office and place of business in the County of Washington and State of Ohio, and a resident and citizen of said State of Ohio, brings this, its bill, against David S. Creamer, Treasurer of State of the State of Ohio, Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, all of whom are residents of the City of Columbus, Franklin County, Ohio, and are citizens and inhabitants of said City of Columbus, Franklin County, Ohio, and of said Southern District of Ohio, Eastern Division.

And thereupon the plaintiff complains and says:

1. The controversy herein arises under the Constitution of the United States. The amount in dispute and involved herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars.

2. The Marietta, Columbus and Cleveland Railroad Company, the plaintiff herein, is, and for several years last past has been, a corporation duly formed and existing as such under the laws of Ohio, for the purpose of owning and operating a railroad extending from Moore's Junction, in Washington County, Ohio, through a portion of said Washington County and a portion of Morgan and Athens Counties, Ohio, and terminating at Palos, in said Athens County, Ohio, in all a distance of about forty-one and nine hundredths (41.09) miles. The plaintiff owns and operates, and during said period has owned and operated, said railroad, and for that purpose owns and uses the necessary rolling stock, fixtures and appurtenances, and is and has been engaged in the transportation of persons and property as a common carrier and is engaged in interstate and foreign commerce, and in intrastate commerce. Plaintiff also operates into and out of Marietta, Ohio, under trackage arrangement.

3. The defendant, David S. Creamer, is the Treasurer of State of the State of Ohio. The defendant, Edward M. Fullington, is the Auditor of State of the State of Ohio. The defendant, Timothy S. Hogan, is the Attorney General of the State of Ohio. The defendant, The Tax Commission of Ohio, is a commission created by an Act of the General Assembly of Ohio, enacted May 10th, 1910, entitled:

"An Act to create a tax commission, define its powers and duties," etc. 101 Ohio Laws, 399); and also an Act of the General Assembly of Ohio, enacted the thirty-first day of May, 1911, entitled: "An Act to repeal sections 5446 to 5542-8, inclusive, of the General Code, as enacted May 10, 1910 (101 Ohio L., 399), relating to the tax commission of Ohio and to further define its powers and duties."—which said Acts clothe the defendants respectively with certain powers and impose upon them certain duties.

4. Sections 81 and 83 of said Act of May thirty-first, 1911, require each railroad company annually, on or before the first day of September, under oath, to make and file with said Tax Commission a statement setting forth, among other things, the

entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state excluding therefrom all earnings derived wholly from interstate business or business done for the federal government, and also the total gross earnings of such Company for such period in this state for business done within this state.

5. Section 88 of said Act provides that on the first Monday of October, said Commission shall ascertain and determine the gross earnings of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived from interstate business or business done for the federal government; and that the amount so ascertained by said Commission shall be the gross earnings of such railroad company for such year.

6. Section 93 of said Act provides that on the first Monday of November, said Commission shall certify to the Auditor of State the amount of gross earnings so determined of each railroad company, for the year ending on the thirtieth day of June next preceding.

7. Section 97 of said Act provides that in the month of November, the Auditor of State shall charge for collection from each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by said Commission as the gross earnings of such company on its intrastate business for the year covered by its annual report to said Commission, as required by said Act, by taking four per cent. of all such gross earnings, which said tax shall not be less than ten dollars in any case.

8. Section 99 provides that the Auditor of State shall then prepare proper duplicates and reports and certify them to the Treasurer of State for collection, and that upon the receipt of such duplicates the Treasurer shall notify each company of the amount of taxes due from it.

9. Section 102 of said Act provides that if any public utility, including railroads, fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, the Treasurer of State shall certify the same to the Auditor of State, who shall add to the tax a penalty of fifteen per cent. thereon and prepare proper duplicates of such taxes and penalties and certify them to the Treasurer of State for collection.

10. Section 103 of said Act provides that such taxes and penalties may be recovered by an action in the name of the State, which may be brought in the Court of Common Pleas of Franklin County or of any county in which the corporation has an office or place of business, or in which the public utility is doing business; that the Attorney General shall institute such an action in any of such courts as said Commission may direct, and that in any such action it shall be sufficient to allege that the tax or penalty sought to be recovered stands charged on the delinquent duplicate of the Treasurer of State, and that the same has been unpaid for a period of thirty days after having been placed thereon.

11. Said Act further provides that said excise tax shall be paid into and become a part of the general revenue fund of the State.

12. Said Act further provides that these taxes and penalties required to be paid by it shall be the first and best lien on all the property of the public utility or corporation.

6 13. Section 120 of said Act provides that if a corporation fails to pay said tax for ninety days after the time prescribed in said Act as aforesaid for paying the same, the said Commission shall certify such fact to the Secretary of State, and the Secretary of State shall thereupon cancel the articles of incorporation of such corporation, if it be organized under the laws of Ohio, by proper entry upon the margin of the record thereof, and that thereupon all the powers, privileges and franchises conferred upon such corporation by such articles of incorporation shall cease and determine.

14. Section 121 of said Act provides that any person or persons who shall exercise or attempt to exercise any powers, privileges or franchises under the articles of incorporation after the same are cancelled, shall be fined not less than two hundred dollars nor more than one thousand dollars.

15. Section 123 of said Act provides that in addition to all other remedies, the Attorney General shall, upon the request of said Commission, whenever said tax or said penalty shall have remained unpaid for a period of ninety days, apply to the Common Pleas Court of Franklin County, Ohio, or of any county of the State where said public utility or corporation is located, for an injunction to restrain the same from the transaction of any business within this State until the payment of such tax or penalty, and that if it be made to appear to the court, upon hearing thereof, that such public utility has failed or neglected for ninety days to pay said tax or penalty, such Court of Common Pleas shall grant and issue such injunction.

16. Section 33 of said Act provides that no injunction shall issue, suspending or staying any order, determination or direction
7 of the Commission, or any action of the Auditor of State, Treasurer of State, or Attorney General, required by law to be taken in pursuance of any such order, determination or direction; but nothing herein shall affect any right or defense in any action to collect any tax or penalty.

17. Prior to September first, 1911, the plaintiff, solely to avoid the pains, penalties and forfeitures herein described, and not admitting or intending to admit the validity of said tax, but objecting to and protesting against the same, filed with said Commission, upon its demand therefor, under the pains and penalties of said Act, a statement showing, among other things, the entire gross earnings of the plaintiff, including all sums earned or charged, whether actually received or not, for the year ending June thirtieth, 1911, from whatever source derived, for business done within this state, excluding therefrom all earnings derived from interstate business or business done for the federal government, said entire gross earnings being the sum of fifty-seven thousand, five hundred and thirty-one dollars ($57,531.).

18. On October 2nd, 1911, being the first Monday of October, said

Commission ascertained and determined the gross earnings of the plaintiff at said sum of fifty seven thousand, five hundred and thirty one dollars ($57,531.).

19. On the first Monday of November, 1911, towit, November sixth, 1911, said Commission certified to the Auditor of State the amount of gross earnings of the plaintiff so determined by it as aforesaid, and said Auditor of State thereupon charged for collection from the plaintiff a sum purporting to be in the nature of an excise tax for the privilege of carrying on its intrastate business, which sum was four per cent. of said amount so certified by said Commission, towit, twenty-three hundred and one dollars and twenty-four cents ($2,301.24), and said Auditor of State thereupon prepared duplicates and a report containing said sum charged against
8 the plaintiff and certified the same to the Treasurer of State for collection, who notified plaintiff thereof.

20. If the plaintiff fails or refuses to pay said sum of twenty-three hundred and one dollars and twenty-four cents ($2,301.24) on or before the fifteenth day of December, 1911, the defendant, David S. Creamer, Treasurer of State of the State of Ohio, will forthwith certify the name of the plaintiff to the defendant, Edward M. Fullington, Auditor of State of the State of Ohio, who will forthwith add to said sum of twenty-three hundred and one dollars and twenty-four cents ($2,301.24) a penalty of fifteen per cent. thereon, and will forthwith prepare duplicates and a report of such tax and penalty thereon and certify them to the defendant, David S. Creamer, Treasurer of State of the State of Ohio, for collection; and the defendant, The Tax Commission of Ohio, will, as provided in Section 120 of said Act as aforesaid, certify to the Secretary of State the fact of such failure on the part of the plaintiff to pay said tax and said penalty, and said Secretary of State will thereupon forthwith cancel the articles of incorporation of the plaintiff.

21. The capital of the plaintiff has been and is, practically without exception, all invested in the said railroad owned and operated by it as aforesaid, which said investment was and is a reasonable and proper one.

22. Due care and prudence have been exercised in the construction, maintenance, operation and equipment of said railroad property and in the conduct of its business, nor have the same been characterized by waste or extravagance. On the contrary, the greatest economy has been and is being practiced in a bona fide effort to make said railroad yield a fair return upon the investment therein, and all practical means have been exhausted to increase or render more remunerative plaintiff's freight and passenger traffic, or either of them.

9 23. Plaintiff's efforts to increase the revenue from its passenger traffic have been largely defeated and rendered ineffectual by the enactment and enforcement by the State of Ohio of the so-called two cent passenger fare law, which said law the plaintiff, though believing the same to be confiscatory, have obeyed for fear of the enormous pains and penalties imposed for its violation.

24. Notwithstanding the efforts of the plaintiff, it has never been able to earn and is not now able to earn, from its interstate or its intrastate business or both combined, after paying necessary and proper expenses, including taxes other than said excise tax, a return on the investment in its said railroad, or on the value thereof, equal to or as much as the current rate of return on legitimate and high grade investments at all times readily available on the market, nor have its intrastate earnings, after deducting expenses properly attributable to intrastate operations (including taxes other than said excise tax) been sufficient to yield a return on that portion of said investment, or on that portion of said value, properly attributable to intrastate operations, equal to or as much as the current rate of return on legitimate, high grade investments at all times readily available on the market as aforesaid. On the contrary, the plaintiff's gross earnings have not been and are not sufficient to pay its actual operating expenses, nor are its gross intrastate earnings sufficient to pay that portion of its operating expenses properly at-ributable to intrastate operations including taxes other than said excise tax, and the plaintiff is actually operating its railroad at a great loss; and said conditions will continue to exist and will exist during the year which said excise tax is intended to cover.

25. Said excise tax and every part thereof exceeds the reasonable annual value of the privilege of carrying on plaintiff's intrastate business, and said excise tax for the current year, amounting to twenty-three hundred and one dollars and twenty-four cents ($2,301.24) as aforesaid, is wholly and as to every part thereof in excess of the reasonable annual value of carrying on plaintiff's intrastate business during said current year. Said tax is, therefore, invalid and void and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and in violation of Article 2 of the Ordinance of 1787, and in violation of the Fourteenth Amendment to the Constitution of the United States.

26. Plaintiff further says that said Act of May thirty-first, 1911, attempts to classify the corporations carrying on business in the State of Ohio, for the purpose of raising general revenue by an excise tax imposed for the privilege of carrying on intrastate business; that said Act provides that an excise tax for such privilege shall be imposed upon all public utilities, as defined by said Act. In Section 39 of said Act, the term "public utility," as used therein, is defined to include corporations, firms and individuals engaged in certain lines of business affected with a public interest, including railroads, but such definition does not include or purport to include all kinds of business affected with a public interest carrying on intrastate business in the State of Ohio, nor all real public utilities so carrying on such business therein. The intrastate business of many of said excluded public utilities is and has been and will be highly remunerative, and the privilege of carrying the same on *or* equal or greater value than the privileges sought to be taxed by said excise tax. The privilege of carrying on their intrastate business by said excluded classes of public utilities is not taxed by said Act or by

any other law whatsoever. The public utilities upon which said excise tax is imposed by said Act must compete and continue to compete with said excluded classes of public utilities in the
11 money markets for the securing of funds necessary to the establishment, betterment, and maintenance of their respective lines of business, and by reason of the arbitrary and discriminatory classification aforesaid under which certain public utilities are subject to said excise tax and others are excluded and free therefrom, those utilities subject thereto, including railroad companies, are placed at a great and constant disadvantage in perfecting and maintaining their several financial arrangements, and will continue to be.

27. Plaintiff further says that said classification is arbitrary, unreasonable, and unduly and unjustly discriminatory against all of the corporation- included in said Section 39 of said Act, and particularly railroad companies, and is unjustly and unduly unequal in its operation, and is not a legitimate exercise of legislative power or discretion, and by reason thereof said classification and said excise tax based thereon are invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

28. Plaintiff further says that said Act makes a subclassification of the public utilities enumerated in Section 39 thereof as aforesaid, by which it imposes an excise tax upon railroad companies and pipe line companies, computed by taking four per cent. of their intrastate earnings, and imposes upon all other public utilities mentioned in said Section a similar excise tax computed by taking one and two-tenths (1.2) per cent. of their gross receipts upon intrastate business, excepting express and telephone companies, as to which the tax is computed by taking two (2) per cent. of such gross earnings; that said sub-classification is unreasonable, arbitrary, unjust, and unjustly and unduly discriminatory as against railroad companies, and is not based upon nor in proportion to their several abilities to pay
12 said tax or the respective values of the privileges taxed, and is not a legitimate exercise of legislative power or discretion; that the value of the privileges upon which the 1.2 and 2 per cent. taxes are imposed are and have been and will be equal to or greater than the value of the privileges upon which the four per cent. tax is imposed, and are not otherwise taxed by said Act or by any other law whatsoever. The pipe line companies and railroad companies, including the plaintiff, upon which said four per cent. tax is imposed by said Act, must compete and continue to compete with said utilities upon which the 1.2 and 2 per cent. taxes are imposed, in the money markets for the securing of funds necessary to the establishment, betterment and maintenance of their respective properties. and by reason of the arbitrary and discriminatory sub-classification aforesaid, said utilities subject to the faur per cent. tax, including the plaintiff, are placed at a great and constant disadvantage and subjected to an unjust and unreasonable discrimination in perfecting and maintaining their several financial arrangements. Said rail-

road companies also, in many instances, are forced to compete for traffic with interurban railroads, upon which a tax of but 1.2 per cent, is imposed, and by reason of said sub-classification said interurban railroads are placed in a position of unfair and unreasonable advantage over said railroads, and said railroads, particularly the plaintiff, are subject to an unfair and unreasonable discrimination against them and in favor of said interurban railroads. Said sub-classification is unjustly and unduly unequal in its operation, and is wholly arbitrary and unreasonable, and by reason thereof said sub-classification and said four per cent excise tax based thereon are invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

13 29. Plaintiff further says that the percentage of gross earnings from intrastate business to total gross earnings varies very widely among the railroads operating in said State, and will continue to do so; that in the case of small local roads, to which class plaintiff belongs, this percentage is high, and the four per cent. tax represents a much greater relative deduction from their total gross earnings than is true in the case of the large interstate railroads, that the cost of conducting local and intrastate business is much greater than the cost of conducting through or interstate business, and such local business is much less profitable.

30. Plaintiff further says that the value of the privilege of carrying on their intrastate business is of much less value to said small local roads, and particularly the plaintiff, than is the value of conducting their intrastate business to the large interstate lines; that the aforesaid difference in cost and in value are and have been matters of common knowledge and general recognition; that as between the several railroads operating in Ohio said four per cent. tax is grossly unjust and unreasonable and discriminatory as against the plaintiff and other railroads similar situated, and places them at a constant disadvantage in competing with the roads upon which the tax bears so much less heavily, as aforesaid. Plaintiff further says that said four per cent. tax is arbitrary, unreasonable, and unduly and unjustly discriminatory against the plaintiff and grossly unequal in its operation as against the plaintiff, and by reason thereof said tax is invalid and in violation of the Constitution of Ohio and particularly the preamble thereof, and Sections 2 and 19 of the Bill of Rights thereof, and also of the Fourteenth Amendment to the Constitution of the United States.

31. Plaintiff further says that for several years prior to the passage of the Act of May tenth, 1910, as aforesaid, the State
14 had attempted to levy an excise tax for the privilege of carrying on their respective lines of business within this State, computed by taking one per cent. of all their gross earnings, upon the several public utilities named in Section 39 of said Act of May thirty-first, 1911; that some of said public utilities, principally railroads and pipe line companies, were engaged in interstate commerce, and it appearing that said one per cent. tax was therefore

invalid, as in violation of the commerce clause of the Federal Constitution, said Acts of May tenth, 1910, and May thirty-first, 1911, were enacted, by which it was attempted, as to the railroads and pipe line companies, to increase the percentage of four per cent. and limit its application nominally to intrastate commerce; the percentage as to other utilities being left practically unchanged; that said increase of said tax to four per cent. was intended to be and was and is an attempt to discriminate against untilities engaged in interstate commerce, and to levy a tax upon interstate commerce and to regulate the same, and that by reason thereof said four per cent. tax is invalid and in violation of the commerce clause of the Federal Constitution.

32. Plaintiff further says that said tax is an attempt to levy a tax upon and to regulate and to impose a burden upon foreign commerce, and is, therefore invalid and in violation of the commerce clause of the Federal Constitution.

33. Plaintiff further says that under Section 47 of said Act of May thirty-first, 1911, said Commission is required to ascertain and assess at its true value in money, all the property in this state of each public utility subject to the Act, including railroads; that by reason thereof said Commission assessed all the property in this state of the plaintiff, that said four per cent. tax is in reality a double tax on plaintiff's property, and is in effect and in fact a property tax, lacking uniformity and equality, and is unequal and unjust and in violation of Section 2, Article 12, of the Constitution of Ohio, and of the Fourteenth Amendment to the Constitution of the United States.

34. Plaintiff has paid all taxes and assessments legally due and payable.

35. Plaintiff further says that by reason of the premises the tax charged against it, as aforesaid, is unconstitutional, invalid and void; that nevertheless, unless this Court shall interfere, as hereinafter prayed for, the plaintiff will be compelled to pay the same or else incur the pains and penalties prescribed in said Act, and if it does not pay said tax, then said penalty will be added thereto as aforesaid, and will, in addition to said principal sum of said tax, become a lien upon the plaintiff's real estate and a cloud upon its title thereto; and the plaintiff will be subjected to numerous harrassing and vexatious suits for the enforcement of said lien, and a further clouding of the plaintiff's title, and otherwise. And the plaintiff's articles of incorporation will be cancelled and its corporate franchises destroyed and its right to be a corporation terminated, and it will be prevented from further serving the public as a common carrier in either intrastate or interstate commerce, and its property will be wrongfully seized for the payment of said tax.

36. Plaintiff further says that it will be impossible to secure an adjudication as to the validity of said tax within the period named in Section 120 of said Act, by interposing such invalidity as a defense to any suit that might be brought for its collection or enforcement; that the purpose and necessary effect of the several provisions of said Act is to compel the plaintiff to pay said illegal or void tax and penalty or to forfeit all its charter rights and franchises, and to have

its corporate existence destroyed, and that it is necessary to interpose at this stage in order to secure relief therefrom.

16 37. Plaintiff further says that said Section numbered 33 of said Act attempts to prevent any judicial examination of the validity of said Act, or any judicial construction of its meaning, and therefore is confiscatory, and if enforced against plaintiff will take its property without due process of law and will deny to it the equal protection of the law, in violation to the Fourteenth Amendment to the Constitution of the United States, and Section 16 of Ohio Bill of Rights.

38. Plaintiff further says that the damages it will suffer in the premises are irreparable, and that it is without adequate remedy at law.

All the matters and things in this bill of complaint set forth, as to the actions, doings and intentions of the defendants, are contrary to equity and good conscience, and tend to the manifest wrong and injury of the plaintiff.

In consideration whereof, and for as much as the plaintiff is remediless in the premises at and by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable or relievable, plaintiff prays your Honors to grant unto it a writ of subpoena, to be directed to each of the defendants herein, commanding them, in conformity with the practice of this Honorable Court, to appear herein and answer this bill of complaint, (but not under oath, and answer under oath being expressly waived); that the defendant, David S. Creamer, Treasurer of State, be temporarily enjoined from certifying the plaintiff to the defendant, Edward M. Fullington, Auditor of State, as delinquent, and that the defendant, Edward M. Fullington, Auditor of State, be temporarily enjoined from receiving such certification and from adding any penalty to said tax charged against the plaintiff or preparing any duplicate or report thereof; that the defendants, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission

17 of Ohio, be temporarily enjoined from certifying to the Secretary of State that the plaintiff has failed to pay said tax on said penalty, and that they and the defendant, Timothy S. Hogan Attorney General, and each of them, be temporarily enjoined from taking any steps toward the collection or enforcement of said tax or said penalty, or the cancellation of plaintiff's articles of incorporation, or otherwise interfering with it or its business, by reason of its failure to pay said tax or said penalty, and that their several servants, agents and employés be likewise so temporarily enjoined, and that upon final hearing said injunction be made perpetual and permanent, and said tax decree to be void; that a temporary restraining order issue forthwith; and for all such other relief as the plaintiff may be entitled to and as to this Hoeorable Court may seem mete; and plaintiff will ever pray.

F. A. DURBAN AND
ROBT. J. KING,
Solicitors for Plaintiff.

The Marietta, Columbus & Cleveland Railroad Company.

STATE OF OHIO,
Muskingum County, ss:

Robert G. Shorter, being duly sworn, deposes and says that he is the Auditor of the plaintiff, The Marietta, Columbus and Cleveland Railroad Company, which is a corporation, and is its officer and agent duly authorized in the premises; that he has read the foregoing bill of complaint; and that the facts stated therein are true, except such as are therein stated to be upon information and belief, and as to such facts affiant verily believes them to be true.

ROBERT G. SHORTER.

Sworn to before me and subscribed in my presence, this 9" day of December, 1911.

[SEAL.] FRANK P. HAINES,
Notary Public.

18 And afterwards, towit: on the 11th day of December, A. D. 1911, an Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

Entry (Tem. Restraining Order Allowed).

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Journal Entry.

This day this cause came on to be heard upon the application of the plaintiff for a temporary restraining order herein, the defendants having been duly notified of the application therefor; on consideration whereof the Court, being fully advised in the premises, finds that said temporary restraining order should be granted, as prayed for.

It is, therefore, ordered, adjudged and decreed that upon giving bond in the sum of $5,000.00, with surety approved by the Court, the defendant, David S. Creamer, Treasurer of State, be and he is hereby restrained from certifying the plaintiff to the defendant, Edward M. Fullington, Auditor of State, as delinquent; and the defendant, Edward M. Fullington, Auditor of State, be and he is hereby restrained from receiving such certification and from add-

ing any penalty to said tax charged against the plaintiff, or
19 preparing any duplicate or report thereof; and the defendants, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and each of them, and The Tax Commission of Ohio, be and they are restrained from certifying to the Secretary of State that the plaintiff has failed to pay said tax or said penalty; and that they and the defendant, Timothy S. Hogan, Attorney General, and each of them, be and they are restrained from taking any steps toward the collection or enforcement of said tax or said penalty, or the cancellation of plaintiff's articles of incorporation, or otherwise interfering with it or its business, by reason of its failure to pay said tax or said penalty, and that *there* several agents, servants and employés be likewise so restrained; and that the defendants be restrained as prayed for in the petition.

This order shall be in full force and effect until ten A. M., January 15, 1912, at which time this cause to be heard on application for temporary injunction; but if for cause case is not heard at above named hour, this restraining order shall continue in force and effect until this Court shall rule on application for temporary injunction.

And afterwards, towit: on the 11th day of December, A. D. 1911, there was filed in the Clerk's Office of said Court a certain Restraining Order Bond in this cause, which said Restraining Order Bond is clothed in the words and figures following towit:

Restraining Order Bond.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Restraining Order Bond.

Know All Men by These Presents: That The Marietta, Columbus and Cleveland Railroad Company and The American Surety Company are held and firmly bound unto David S. Creamer, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and
20 Christian Pabst as The Tax Commission of Ohio and The Tax Commission of Ohio in the sum of five thousand dollars ($5,000.00) to the payment of which they bind themselves, and their successors firmly by these presents.

Sealed with our seals, and dated this 11th day of December, A. D. 1911.

The condition of the above obligation is such, that Whereas, said The Marietta, Columbus and Cleveland Railroad Company, a citizen of the State of Ohio, as plaintiff having filed on the Chancery side of the Circuit Court of the United States for the South-

ern District of Ohio, a Bill against the said David S. Creamer, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn and Christian Pabst as The Tax Commission of Ohio and The Tax Commission of Ohio and having obtained an allowance of a temporary restraining order as prayed for in said Bill, from the certifying by said Creamer, Treasurer of the plaintiff, to said Fullington, Auditor, as delinquent in payment of the so called excise tax for the privilege of carrying on intra-state business, and from the receiving of such certification by said auditor or the adding by him of any penalty to said tax, or preparing any duplicate thereof and from the certifying of plaintiff as delinquent to the Secretary of State by the Defendants, Dittey, Munn and Pabst as The Tax Commission of Ohio or The Tax Commission of Ohio and from the taking of any steps for the collection or enforcement of said tax or penalty by the said Dittey, Munn and Pabst as The Tax Commission of Ohio, or the Tax Commission of Ohio of said Attorney General, as more fully appears in said restraining order. Now if the said The Marietta, Columbus and Cleveland Railroad Company, shall abide the decision of said Court and pay all moneys and costs which shall be adjudged against it in case the said restrain-
21 ing order shall be dissolved, then these presents shall be void: otherwise to remain in full force.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, [SEAL.]
By R. G. SHORTER, *Its Auditor.*
AMERICAN SURETY COMPANY OF NEW YORK,
By R. I. ZIMMERMAN, *Res. Vice Pres.*

Signed and sealed in presence of
F. A. HIGHT.

Attest:
ARTHUR D. MURPHY,
Res. Ass't Sec'y.

Thereupon there was issued out of the Clerk's Office of said Court, our certain Temporary Restraining Order in this cause, directed to the Marshal of said District and against said Defendants which said Temporary Restraining Order is clothed in the words and figures following, towit:

Temporary Restraining Order.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, ss:

The President of the United States of America, to David S. Creamer, Treasurer of State of the State of Ohio, Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and the Tax Commission of Ohio, Greeting:

Whereas The Marietta, Columbus and Cleveland Railroad Company, a corporation under the laws of Ohio, citizen of the State of Ohio has filed on the Chancery side of the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, a bill against David S. Creamer, Treasurer of State of the State of Ohio, Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as
22 The Tax Commission of Ohio and The Tax Commission of Ohio, and has obtained an allowance for a temporary restraining order, as prayed for in said Bill, from Hon. Howard C. Hollister, U. S. District Judge sitting and holding U. S. Circuit Court.

Now, Therefore, we having regard to the matters in said Bill contained, do hereby command and strictly restrain you, the said David S. Creamer, Treasurer of State from certifying the plaintiff to the defendant, Edward M. Fullington, Auditor of State, as delinquent, under the four per cent excise tax law; and you the defendant, Edward M. Fullington, Auditor of State from receiving such certification and from adding any penalty to said tax charged against the plaintiff, or preparing any duplicate or report thereof; and you the defendants, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and each of you, and you The Tax Commission of Ohio, from crtifying to the Secretary of State that the plaintiff has failed to pay said tax or said penalty; and you and the defendant, Timothy S. Hogan, Attorney General, and each of you, from taking any steps toward the collection or enforcement of said tax or said penalty, or the cancellation of plaintiff's articles of incorporation, or otherwise interfering with it or its business, by reason of its failure to pay said tax or said penalty, and your several agents, servants and employés are likewise so restrained; and you the defendants are restrained as prayed for in the petition. This order shall be in full force and effect until ten A. M. January 15th, 1912, at which time this cause is to be heard on application for temporary injunction; but if for cause case is not heard at above named hour, this restraining order shall continue in force and effect until this Court shall rule on application for temporary injunction.

23 Which commands and injunctions you are respectively required to observe and obey, until our said Circuit Court shall make further order in the premises.

Hereof fail not, under the penalty of the law thence ensuing.

Witness, The Honorable Edward D. White, Chief Justice of the United States, this 11th day of December, 1911, and in the 136" year of the Independence of the United States of America.

[SEAL.] B. E. DILLEY, *Clerk*,
U. S. Circuit Court, S. D. O.,
By F. A. HIGHT, *Deputy*.

Thereupon there was issued out of the Clerk's Office of said Court, our certain Subpœna in this cause, directed to the Marshal of said District and against said Defendant which said Subpœna is clothed in the words and figures following, towit:

Subpœna.

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are hereby commanded to summon David S. Creamer, Treasurer of State of the State of Ohio, Edward M. Fullington, Auditor of State of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, citizens of and resident in the State of Ohio, if they be found in your District, to be and appear in the Circuit Court of the United States for the Eastern Division of the Southern District of
24 Ohio, aforesaid, at Columbus, on the first Monday in March next, to answer a certain Bill in Chancery, filed and exhibited in said Court, against them by The Marietta, Columbus and Cleveland Railroad Company, a corporation organized under the laws of Ohio, citizen of and resident in the State of Ohio.

Hereof you are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 11th day of December, A. D., 1911, and in the 136th year of the Independence of the United States of America.

[SEAL.] B. E. DILLEY, *Clerk*.
Attest:

Memorandum.

The said defendants are required to enter their appearance in this suit in the Clerk's Office of said Court on or before the first Monday of February, 1912, otherwise the said bill may be taken pro confesso.

B. E. DILLEY, *Clerk*.

And afterwards, towit: on the 15th day of December, A. D. 1911, came the Marshal of said District to whom the said writ was in form aforesaid directed and returned the same into the Clerk's Office of said Court with his proceedings endorsed thereon, clothed in the words and figures following, towit:

Marshal's Return (Temporary Restraining Order).

Received this writ at Columbus, Ohio, on December 11, 1911, and on the same day I served the within named David S. Creamer, Treasurer of State of the State of Ohio, by delivering to him
25 a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named Edward M. Fullington, Auditor of State of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

And on December 12, 1 served the within named Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, by delivering to each personally a true copy of this writ, with the endorsements thereon, by handing same to each personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named The Tax Commission of Ohio by delivering a true copy of this writ, with the endorsements thereon, to Robert M. Dittey, Chairman of said Commission, by handing same to him personally, at Columbus, Ohio.

And on December 13, 1911, I served the within named Timothy S. Hogan, Attorney General of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
By W. J. SANDERSON, *Deputy.*

Total Fees: $16.50.

And afterwards, towit: on the 15th day of December, A. D. 1911, came the Marshal of said District to whom the said writ was in form aforesaid directed and returned the same into the Clerk's Office of said Court with his proceedings endorsed thereon, clothed in the words and figures following, towit:

26 *Marshal's Return (Subpœna).*

U. S. Marshal's Return.

Received this writ at Columbus, Ohio, on December 11, 1911 and on the same day I served the within named David S. Creamer, Treasurer of State of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named Edward M. Fullington, Auditor of State of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, by delivering to each personally a true copy of this writ, with the endorsements thereon, by handing same to each personally, at Columbus, Ohio.

And on December 12, 1911, I served the within named The Tax Commission of Ohio by delivering a true copy of this writ, with the endorsements thereon, to Robert M. Dittey, Chairman of said Tax Commission, by handing same to him personally, at Columbus, Ohio.

And on December 13, 1911, I served the within named Timothy S. Hogan, Attorney General of the State of Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, by handing same to him personally, at Columbus, Ohio.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
By W. J. SANDERSON, *Deputy.*

Total Fees: $16.34.

27 And afterwards, towit: on the 15th day of January, A. D. 1912, an Entry was made upon the Journal of said Court in said cause, which said Entry is clothed in the words and figures following towit:

Entry (Restraining Order to Continue in Force).

In the United States Circuit Court for the Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Journal Entry.

For cause duly shown, the plaintiff's application for a temporary injunction herein is not heard at ten A. M. January fifteenth, 1912, and accordingly the restraining order heretofore issued herein continues in force and effect until this Court shall hear and rule upon such application for a temporary injunction.

And afterwards, towit: on the 23rd day of July, A. D. 1912, an

Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

28 *Entry (Leave to File Demurrer).*

No. 1600.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, Plaintiff,
vs.
DAVID S. CREAMER, Treasurer of State, et al., Defendants.

Entry.

Upon application and for good cause shown, leave is granted the Defendants to file their Demurrer in this cause, and same is accordingly filed.

And afterwards, towit: on the 23rd day of July, A. D. 1912, came the Defendants, by their Attorneys, and filed in the Clerk's Office of said Court, their Demurrer in this cause, which said Demurrer is clothed in the words and figures following, towit:

Demurrer.

In the District Court of the United States, Southern District of Ohio, Eastern Division.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission, and the Tax Commission of Ohio, Defendants.

Demurrer of the Above-named Defendants, David S. Creamer, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission, and The Tax Commission of Ohio to the Bill of Complaint of the Above-named Plaintiff.

The defendants by protestation not confessing or acknowledging all or any of the matters or things in said Bill of Complaint
29 contained to be true, in such manner and form as the same are therein set forth and alleged, do demur to the said Bill

and to each and every paragraph thereof. And for cause of demurrer show that it appears by the plaintiff's own showing by the said Bill that it is not entitled to the relief prayed by the Bill against these defendants.

Wherefore, and for divers other causes of demurrer appearing from said Bill, these defendants do demur thereto, and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said Bill, and they humbly pray to be hence dismissed with the reasonable costs in this behalf sustained.

TIMOTHY S. HOGAN,
Attorney General of Ohio, Solicitor for the Defendants.

CLARENCE D. LAYLIN,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

TIMOTHY S. HOGAN,
Attorney General of Ohio, Solicitor for the Defendants.

STATE OF OHIO,
Franklin County, ss:

Robert M. Dittey, being duly sworn, deposes and says that he is a member of and Chairman of The Tax Commission of Ohio, and is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay.

ROBERT M. DITTEY.

Sworn to before me and subscribed in my presence this 20th day of July, A. D. 1912.

[SEAL.] A. J. SMART,
Notary Public within and for Franklin County, Ohio.

30 And afterwards, towit: on the 5th day of October, A. D. 1912, an Entry was made upon the Journal of said Court, in said cause, which said Entry is clothed in the words and figures following, towit:

Entry (Case Set for Hearing November 26, 1912).

United States District Court, Southern District of Ohio, Eastern Division.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, Complainant,

vs.

DAVID S. CREAMER, Treasurer of the State of Ohio, Defendant.

Order.

The complainant having filed in this Court its bill against the defendant, alleging that the law under which such Treasurer is operating is in certain respects unconstitutional and praying for a permanent injunction on the final hearing, and has also applied for an interlocutory injunction pending such hearing.

Now, therefore, in pursuance of Section 266 of the Judicial Code of the United States, I do hereby call to my assistance, for the purpose of hearing and determining such application and such case on its merits, if counsel be ready thus to present the same, the Honorable John W. Warrington, United States Circuit Judge for the Sixth Judicial Circuit, and the Honorable William L. Day, United States District Judge for the Northern District of Ohio,—such hearing to be had in the Court Room in the Federal Building at Columbus, Ohio, on November twenty-sixth, 1912, at ten o'clock A. M.

31 It is further ordered that counsel for the respective parties to such action be present, to present such case at the time above named on the appliaction for an interlocutory injunction or on the merits, as they may elect and circumstances permit.

J. E. SATER,
United States District Judge.

And afterwards, towit: on the 15th day of February, A. D. 1913, there was filed in the Clerk's Office of said Court a certain Opinion in this cause, which said Opinion is clothed in the words and figures following, towit:

Opinion.

United States District Court, Southern District of Ohio, Eastern Division.

No. 1593.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ROBERT M. DITTEY, FRANK E. MUNN, and CHRISTIAN PABST, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

No. 1600.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

On Plaintiff's Application for Interlocutory Injunction and Defendants' Demurrer.

Before Warrington, Circuit Judge, and Sater and Day, District Judges.

Per Curiam:

Jurisdiction of these cases is vested in this Court through the presence of certain federal questions, no matter how it shall be found necessary to decide them or whether to decide them at all. Siler v. Louisville & Nashville, R. R. Co., 213 U. S., 175; Mich Cent. R. R. Co. v. Vreeland, decided by U. S. Supreme Court, January 20, 1913; L. & N. R. Co. v. Siler, 186 Fed. Rep., 176.

33 The plaintiff in each of the cases is an Ohio corporation, whose line or road lies wholly within the state. In each case the plaintiff challenges the constitutionality of certain sections of the Act of May 31, 1911, 192 Ohio L., 224-260, creating a tax commission and providing for a system of taxation, and imposing a sum which the Act recites is in the nature of an excise tax upon the privilege of carrying on intra-state business. A restraining order having been granted in each case, the respective plaintiffs seek a temporary injunction. The defendants, who are certain state officers and members of the tax commission, demur to each of the bills. The cases are for hearing on the plaitniffs' application for an

interlocutory injunction and upon the demurrers of the defendants.

The law under consideration is a re-enactment of the Act of March 10, 1910. Its history is contained in the brief filed in behalf of the State, but its development need not be traced. The Act raises the rate of the so-called excise taxation on certain utilities, substitutes a tax commission for a board of appraisers and assessors, assembles the various tax laws of the state and incorporates them into one measure.

The term "public utility," as used in the Act and as defined in Sec. 39, means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, referred to in such section,—a railroad company being one of the many kinds of companies therein mentioned and includes also any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations. By the provisions of Sec. 40, any person or persons, firm or firms, copartnership or voluntary association,
joint stock association, company or corporation, wherever
34 organized or incorporated, when engaged in the business of operating a railroad, either wholly or partially within the state, on rights of way acquired and held exclusively by such company, or otherwise, is a railroad company.

Section 42 defines the term "gross earnings" "to mean and include the entire earnings for business done by any person or persons, firm or firms, copartnership or voluntary association, joint stock, association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

Sec. 83 requires a statement to be filed by each railroad company with the Tax Commission containing the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the 30th day of June next preceding, from whatever source derived, for business done within the state, excluding therefrom, however, all earnings derived wholly from interstate business or business done for the federal government. The statement must also contain the total gross earnings of such company for such period from business done within the state. By the terms of Sec. 97, the Auditor of State in the month of November is required to charge for collection against each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intra-state business. The amount so charged is four per cent, and is computed on the gross earnings, as fixed and reported to him by the Commission, of the company's intra-state business for the year covered by its annual report to such Commission, but the tax shall not be less than ten dollars in any case. The various public utilities

named in the Act are classified. The percentage charged for collection as an excise tax for the privilege of carrying on
35 intra-state business is the same as to all utilities falling within any given class, but varies as among different classes,. The tax imposed for instance on railroad companies for such privilege is, as we have seen, four per cent. of the gross earnings of their intra-state business, to the exclusion of the earnings derived wholly from interstate business and business done for the federal government (Sections 46, 72, 83, 88, 93, 97), while that assessed for a like purpose against the similar earnings of street, suburban and interurban railroad companies is but 1.2%, and of express and telegraph companies 2%.

While the mere declaration of the General Assembly that the tax is an excise tax not make it so, if it is apparent that it cannot be consistently so designated, nevertheless the declaration of the law-making body is entitled to much weight. Flint v. Stone Tracy Co., 220 U. S., 107, 145. In view of the decisions, state and federal, it is plain that the tax in question is an excise tax on the doing of corporate intra-state business, the gross intra-state business being the yardstick or measure of taxable value. Southern Gum Co. v. Laylin, 66 Ohio St., 578; State v. Ferris, 53 Ohio St., 314; Ashley v. Ryan, 49 Ohio St., 504; Western Union Telegraph Co. v. Mayer, 28 Ohio St., 521; Express Co. v. State, 55 Ohio St., 69; Adler v. Whitbeck, 44 Ohio St., 539; Thomas v. U. S., 192 U. S., 363; Cooley, Const. Lim. 6th ed., 608.

Each plaintiff contends that, because it is unable to earn upon its investment a reasonable profit attributable to intra-state business, it possesses no privilege worth four per cent. of its gross intra-state earnings and that such a tax is as to it both confiscatory and discriminatory. The Ohio River & Western Railway Company alleges that a tax of four per cent. of its gross intra-state earnings
36 is excessive, because, though carefully managed, it does not produce, without the imposition of such tax, a profit equal to the return upon high grade investments at all times available in the money market. The Marietta, Columbus & Cleveland Railway Company charges that it is actually operated at a loss. Are the plaintiffs or either of them for the reasons stated exempt from the excise tax in question? It was held in State v. Ferris, p. 341, and is conceded by the plaintiffs, that the first section of the fourteenth amendment to the constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws" is no broader than the second section of the Ohio bill of rights, and that therefore a statute relating to an excise tax authorized by the bill of rights would not conflict with such section of the constitution of the United States; but the plaintiffs, to maintain their contention, point to the following language in Southern Gum Co. v. Laylin, pp. 578, 594:

"But upon the power to tax privileges and franchises there is no express limitation in the constitution, but certain limitations upon that power must be implied from other provisions of the constitution, so as to make the whole instrument harmonious and consistent

throughout. The constitution was established to 'promote our common welfare.' Preamble to the Constitution. Government is instituted for the equal protection and benefit of the people. Section 2 of the Bill of Rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section 19 of the Bill of Rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. Ashley v. Ryan, 49 Ohio St., 504, State v. Ferris, 53 Ohio St., 314, and Hagerty v. State, 55 Ohio St., 613, are examples of taxing the privileges or franchise conferred; while Telegraph Co. v. Mayer, 28 Ohio St., 521, and Express Co. v. State 55 Ohio St., 69, are examples of taxing the continued value of the existing privilege or franchise from year to year.

These limitations prevent confiscation and oppression under
37 the guise of taxation, and the power of such taxation cannot be extended beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rest largely in the General Assembly, but finally in the courts."

An examination of that case as reported, as well as of the original file papers, discloses that no contention was made and no issue tendered that the statute then under consideration imposed a tax beyond the reasonable value of the privilege or franchise originally conferred or its continued value from year to year, nor do any of the cases cited in the above quoted excerpt touch that question. The limitation thus to be imposed by the state constitution on the legislative power to tax cannot, however, be safely treated as a dictum, for the reason that it is carried forward into the syllabus, which in Ohio states the law of the case. The Court dealt in that case with a general law and its operation on all corporations of given classes throughout the state, and not with its operation on specific financially weak corporations of any one of those classes. It did not consider the same question as is here presented, and we are constrained to believe that it did not mean to hold that the courts, as final arbiters, may overthrow a law which imposes a tax on privileges and franchises merely because in isolated cases such law imposes a hardship, but that it had reference to a law the effect of whose enforcement is to produce that result generally. This is made clear by the same court in State v. Guilbert, 70 Ohio St., 253, where it is said:

"We are of the opinion that an excise tax which operates uniformly throughout the state and applies equally to all the subjects embraced within its terms, cannot be said to deprive any of the equal protection of the law, or in any manner to violate the bill of rights, or any section of the constitution."

The earlier case of Western Union Telegraph Co. v. Mayer, 28 Ohio St., 521, is also instructive. A law of uniform operation, which imposed an excise tax at a rate equal to that on property,
38 on the gross receipts of foreign express and telegraph companies doing business in Ohio and prohibited, under heavy

penalties, any person from acting as agent of or transacting any business for any company that defaulted in the payment of such tax, was alleged to be violative of both the state and federal constitution. The tax was a charge on the privilege of such corporations exercising their franchises and powers within the state until the tax, interest and penalties thereon were fully paid. It was computed on the gross receipts arising manifestly not only from distinctively intra-state business, but from business which began elsewhere and terminated within the state, or had its inception in the state and terminated beyond its limits. Thus reckoned, the amount was 3.34% of such receipts, but if restricted as it should have been to the purely intra-state business, it equalled 31.2% of the total receipts from that source, or 93.6% of such receipts not absorbed by current expenses. It was charged that the tax was oppressive and unjust in its operation, but the tax was upheld, it being stated in the opinion regarding its provisions that——

"They are the conditions upon which corporations named in the act are allowed to do business within the state. Whether this tax is warranted by a wise public policy, or whether it is too onerous, are questions for the legislature and not for the courts. The burden is the price paid for transacting their business within the state. Any regulations imposed on such corporations, not amounting to a regulation of commerce, nor a tax on the property of the corporation within the state, imposed as a compensation to be paid to the state for the privilege of doing business within its territory, is, we think within the legislative power of the general assembly. The unbroken current of judicial authority is in support of such power in the state, and in our opinion public policy demands its exercise."

The Court, it is true, was speaking of a law affecting foreign corporations only which could exercise none of their powers or franchises within the state, save through comity or under
39 legislative consent, and which the court found might have been excluded from the state altogether, with which theory we have nothing to do. But it is also true that it recognized the power to raise the necessary funds to defray the legitimate expenses of government by modes other than an ad valorem system of taxation on all property in the state and the legislative power to create domestic corporations and prescribe the terms upon which they, as well as foreign corporations, might exercise their franchises. The right to extend the tax to domestic corporations undoubtedly existed, as was later held in the Southern Gum Company case, but the legislature did not see fit to embrace such corporations within the law. It would therefore seem to follow that the language quoted is applicable to domestic as well as foreign corporations and that a law which, being of uniform operation, although it levied a charge almost equal to the entire net and distinctively intra-state profits of an individual corporation of a given class, is not, on that account, repugnant to any constitutional provisions, state or federal.

Some assistance is derived from Adler v. Whitbeck, 44 Ohio St., 539, which arose under a law the authority for whose enactment in based both upon the constitutional provision (Schedule, Sec. 18,

Constitution of Ohio) that "no license to traffic in intoxicating liquors shall hereafter be granted in this state, but the General Assembly may by law provide against evils resulting therefrom," and the power of taxation granted in the same organic instrument. The law imposed a tax on the business of trafficking in intoxicating liquors and involved the exercise of both the police power (p. 563, and McGuire v. State, 42 Ohio St., 532) and the power to tax (pp. 562, 568, Anderson v. Brewster, 44 Ohio St., 583). It served a double purpose—the restraint of the evils resulting from the liquor traffic, and the creation of a revenue to indemnify the general
40 taxpayer for the increased burden imposed on him by the business. The tax was said to be in the form and nature of a tax upon the business (p. 563), and in the Southern Gum Company case it is affirmatively characterized as an excise tax applied to the liquor traffic on account of the additional burdens imposed on the state. In this respect it is assimilated to the tax here under consideration, whose object is to compensate the state and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the government over corporate public utilities and for the benefit of those who own and operate such. Ashley v. Ryan, 49 Ohio St. 504, 525; Cincinnati Gaslight & Coke Co. v. State, 18 Ohio St., 238, 243; Baker v. Cincinnati, 11 Ohio St., 534, 543; Southern Gum Co. v. Laylin, p. 595; Western Union Telegraph Co. v. Mayer. The contention was made in the Adler case that the enforced payment of the tax on the business of trafficking in intoxicating liquors would impose on many of small means such financial hardship as to drive them out of business. The court recognized that such would be the consequence, but it did not deem the law invalid on that account (pp. 560, 561, 567), as such result would arise from extraneous circumstances and not from the law.

Equality in regard to taxation of property is the great idea of the Ohio Constitution. Baker v. Cincinnati, 11 Ohio St., 541. The legislature, conforming as nearly as may be to the purposes of the framers of the constitution, has intended to reach, for taxation, the property of every citizen, whatever its form may be, which is not by the organic law specifically exempt, to the end that all shall bear their just share of the public burdens. Lewis v. State, 69 Ohio St., 479; Southern Gum Co. v. Laylin, p. 593. There can be no exemption of property from taxation, unless the right of exemption is clearly expressed. Lander v. Burke, 65 Ohio St., 532,
41 542. The estate of an insolvent decedent must contribute, and to the same relative extent as a prosperous enterprise or the estate of a wealthy decedent. Sec. 2734, R. S. McNeill v. Hagerty, 51 Ohio St., 255, 265. The creditors of an insolvent's estate really pay the tax, just as the bondholders and other creditors of the money losing plaintiff, under the rule of equality, in fact must do, if it be required to pay the excise tax charged against it. But absolute equality and uniformity is not attainable under the Ohio or any other system of taxation. An approximation thereto is all that is practicable. Shotwell v. Moore, 45 Ohio St., 646; Ashley v. Ryan, 49 Ohio St., 525, 526. Judge Cooley, in his work on Taxa-

tion, 3rd ed., 390, 391, with great force and accuracy, in speaking on this subject, says:

"It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws. While equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical. * * * The legislature must judge of the general result, and when the law has apportioned the tax, individual hardships must be regarded as among the inconveniences which are incident to regular government. The same necessity that justifies any taxation will justify and sustain any reasonable provisions for giving it effect. The necessity of the state and of reasonable provisions for the security of the individual must be equally considered; the state is no more to be deprived of its revenue, because of individual hardships resulting from general rules, than is an individual to be stripped of his property without law, because in its necessity the state finds it more convenient to take it thus, than by regular proceedings. The incidental hardship or inconvenience must be submitted to in either case."

The rule of non-exemption on account of the impracticability of absolute equality of taxation thus recognized by the state court and so clearly stated by Judge Cooley, was applied and enforced as to an excise tax in Marmet v. State, 45 Ohio St., 69, where Judge
42 Spear, speaking for the court, held that absolute equality of burdens, whether applied to taxes or other subjects of legislation, is not to be expected in our laws, and that the wisdom of man has not yet devised a system of equalizing burdens so perfect in its application and so thorough in its enforcement as to leave no room for adverse comment or criticism. An excise tax is not a tax on property, State v. Ferris, p. 326, Cincinnati Gaslight & Coke Co. v. State, p. 243, State v. Hipp, 38 Ohio St., 225, Ashley v. Ryan, 49 Ohio St. 504, 525, but it must, to be valid, operate with equality and uniformity, unaffected by any questions as to the solvency or insolvency of the person that is required to pay. That the rule announced in the Marmet case persists appears from Ashley v. Ryan, pp. 525, 526, and State v. Ferris. In the Ferris case, an inheritance tax law providing for an excise tax on the right to receive property was overthrown, because it violated the rule of equality and did not afford to all upon whom its provisions operated equal protection and benefit. It was said (pp. 337, 338):

"Our constitution requires equality in our tax laws, and also equality in their execution as near as may be. The only exemption allowed, as to taxation of property, is personal property to the amount of two hundred dollars to each individual, and certain other property devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the legislature has the power to exempt personal property from taxation. The constitution must be regarded as consistent with itself throughout, and as Section 2, of article 12, permits an exemption from taxation of

personal property not exceeding two hundred dollars, a construction of section 2 of the bill of rights is thereby evinced to the effect that in taxation of subjects other than property, an exemption up to two hundred dollars in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the constitution, and it is this equality that is the pride and safeguard of us all."

The above announcement is in harmony with the utterances of the federal courts. In State Railroad Tax Cases, 92 U. S.,
43 575, a law was under consideration which imposed a tax on the franchise, capital stock, business and profits of the complaining corporations. One of the corporations was insolvent and in the hands of a receiver, its earnings not being sufficient to pay any of the interest on its bonded debt or anything beyond its necessary expenses for operation and repairs. Another of the companies met all of its expenses and interest on a large debt and declared large dividends. Each owned a large amount of tangible property and each possessed a franchise which it was held, as in Ashley v. Ryan, p. 525, to be valuable. They were both said to be alike subject to the law for the reason that insolvent corporations could no more escape taxation than insolvent individuals, many of whom pay taxes on realty which is mortgaged in excess of the value of all their property, both real and personal, the court adding that no state has ventured to establish the principle of permitting its visible tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts. In speaking of the insolvent company, Mr. Justice Miller said:

"Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling-stock and other tangible property? Is it supposed by any one that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town-lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of
44 Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so

much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.

It is this franchise which the legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debts, who shall say that it is not worth $2,000,000? And who shall say that such is not the real value now of this franchise?

See also Flint v. Stone Tracy Co., pp. 165, 167, 168. We think it can be confidently asserted that the Supreme Court of Ohio meant by the language employed in the Southern Gum Company case that only those excise tax laws, the result of whose operation is generally confiscatory and oppressive, are unconstitutional, and that it did not intend to say that a law, general and uniform in its operation, is invalid, because in exceptional cases it may impose a hardship.

The General Assembly was empowered to impose a tax on the gross receipts of the respective plaintiffs, Western Union Telegraph Co. v. Mayer, pp. 531, 540, State v. Reinmund, 45 Ohio St., 214, Express Co. v. State, 55 Ohio St., 69, 77, State Tax on Ry. Cross Receipts, 15 Wall., 284, and direct the application of the tax when collected to purposes of general revenue or any other purpose authorized by law. Ashley v. Ryan, p. 525; State v. Ferris, p. 314; State v. Guilbert, p. 254. Both of the plaintiffs require governmental protection and the exercise of its supervisory power, and each should in justice bear its fair share of the government's burden. Were either of them to escape taxation on account of its exceptional condition, all other unprofitable corporate enterprise would likewise be relieved, and thus a practical system of taxation would be rendered impossible and the state be deprived of the power to meet its legitimate expenses.

45 The claim that the law in question is discriminatory in that (1) it does not include all public utilities engaged in business in Ohio, and (2) does not operate uniformly among the utilities named, is not supported by either the state or federal decisions. The inheritance tax law under consideration in Hagerty v. State, 55 Ohio St., 613, providing for exemptions in the amount of two hundred dollars, was assailed as discrimatory as among collateral kindred, the tax being imposed upon the value of the property received by some and not upon that received by others. The law was sustained because the power exercised by the general assembly in the enactment of the law was legislative and vested by the legislative grant as expressed in the first section of the second article of the constitution, and as the right to receive property by inheritance is not guaranteed by the constitution, that instrument prescribed no limitation upon the power of the general assembly to designate the persons who may thus receive. The discrimination was based upon and held justified by the fact that there are degrees in collateral kinship. In commenting on that case in State v. Guilbert, the state

court approved the language employed in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, regarding a similar law, that the states may tax the privilege of taking property by devise or descent, may discriminate between relatives, and between them and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions regarding uniformity and equality in taxation. In the Guilbert case, which also involved an inheritance tax law, the conclusion was reached (and we understand it to be the statement of a rule applicable to excise taxes) that—

"When it is determined, as was determined in the Ferris case * * * that the tax is an excise tax, and as in the Hagerty case * * * that the authority to impose the tax is conferred by the general grant of legislative power, then the selection of the subjects on which the tax will be imposed must be within the legislative competency."

46 Many illustrations may be found in the statutes and reported cases of the rule thus announced. In Marmet v. State, an ordinance was upheld imposing a license fee on the owners of all vehicles used upon the streets of Cincinnati excepting farmers marketing the products of their own farms. In the Adler Case, the tax on the business of trafficking in liquors was sustained, although it did not bring within its provisions the manufacture of intoxicating liquors or the sale of them by the manufacturer in quantities of one gallon or more at any one time. The line was drawn between the distillery and the brewery on the one hand and the saloon on the other. In Western Union Telegraph Co. v. Mayer, a corporation franchise tax imposed on foreign express and telegraph companies and on no other public utility companies, was sustained. Section 2780-17, Rev. St., imposed an excise tax for state purposes only of one per cent. per annum upon the gross receipts of steam railroad, street and interurban railroad, express, telegraph and telephone companies when engaged in business either wholly or partially within the state, but it did not apply to water transportation companies unless the whole of their business was done within the state. Under the Nichols law (Sec. 2778*a*, R. S.), the property of express, telegraph and telephone companies was subjected to taxation, the value of such property being determined not merely by the consideration of the visible property, as in the case of all other corporations whose property, as in the case of all other corporations whose property is taxed, but by the value of the entire capital stock and by such other evidence and rules as will enable the boards fixing such valuation to arrive at the true value in money of the entire property of the companies in the state. A tax levied on such valuation was upheld in State v. Jones, 51 Ohio St. 492, and Adams Express Co. v. Ohio, 166 U. S., 185. Notwithstanding the establishment of the validity of that method of taxation, it was not extended to any other corporations in the state. The general assembly has seen fit to deter-

47 mine, in the enactment of the law now before us, what occupation or lines of industry are public service enterprises and invested with those attributes which pertain to public interest or

public service, but has exempted from the operation of the law, for instance, grain elevator companies, warehousing, stockyards, ferries, bridge companies and innkeepers, but it had a right so to do, and the selection made by it will not be disturbed by the courts unless the determination of the legislative body was clearly arbitrary. The law imposes no burden upon one class of utilities from which others similarly situated are exempt, and as it does not affect any right of the plaintiffs differently from that of others in the class to which they belong, it is not obnoxious to the constitution. Snell v. St. Ry. Co., 60 Ohio St., 269; State v. Guilbert, pp. 229, 245; 37 Cyc. 746. The same rule is recognized by the federal courts. In Kane v. Erie R. Co., 133 Fed. Rep., 681, 685, C. C. A. 6, in which a provision of an Ohio statute relating to railways was involved, it was said:

"The doctrine is well settled that the General Assembly, in the absence of an applicable prohibtion, has power to classify subjects of legislation, conferring rights or imposing burdens on the created classes, according to its views of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be some reasonable ground for the classification made."

The rule so announced has been recognized in Magoun v. Illinois Trust & Savings Bank, supra, and in Home Ins. Co. v. New York, 134 U. S. 594, in each of which a statute was under consideration which involved an excis tax. Other cases in point are Kentucky Railroad Tax Cases, 115 U. S. 321; Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232; Connolly v. Union Sewer Pipe Co., 184 U. S., 540; Brown-Forman Co. v. Kentucky, 217 U. S., 563; Southwestern Oil Co. v. Texas, 217 U. S., 114; Adams Express Co. v. Ohio, 165 U. S., 194, 228. The law is well expressed
48 in Bell's Gap Railroad Co. v. Pennsylvania (p. 237), where it is said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution."

In view of what has heretofore been said and authorities cited, it is clear that there is no merit in the contention that, because certain utilities of a given class pay one rate of tax and others of another class another rate, the law is wanting in uniformity of operation.

Another insistence is that the Act as applied to railroads lays a

burden on interstate commerce. The tax by express provision is levied on gross intra-state earnings only. Those derived wholly from interstate business and business done for the federal government are specifically excluded in computing the amount to be paid. The rule announced in Ratterman v. Western Union Tel. Co., 127 U. S., 424, 425, is that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the state will be permitted to collect that arising upon the latter. As the gross intra-state earnings can be readily separated from all others, the law is not open to the objection urged. Ratterman v. Express Co., 49 Ohio St., 618; Express Co. v. State, pp. 69, 81; Western Union Tel. Co. v. Kansas, 216 U. S., 1, 31, 32, Kehrer v. Stewart, 197 U. S., 60, 67.

49 The further charge is made that, inasmuch as plaintiffs each pay a property tax, the tax provided by the Act in question is not permissible in that it denies them the equal protection of the law by subjecting them to double taxation. McNeill v. Hagerty, 51 Ohio St., 255, 268; Collett v. Springfield Savings Soc., 13 Ohio C. C., 131, 137. This cannot be true, because the exaction of four per cent. of the gross intra-state earnings is not a property tax, but is an excise tax, the amount of which is fixed and measured by the amount of such earnings. Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same object within the same jurisdiction. Bradley v. Bauder, 36 Ohio St., 28, 35. The plaintiffs pay but one tax on property, and another as an excise tax. The taxation, therefore, is not double. Southern Gum Co. v. Laylin, p. 596.

The Act is also said to be unconstitutional in that it seeks to prevent judicial inquiry into its constitutionality and enforce obedience to its terms and the administrative acts thereunder, irrespective of their validity. To sustain this claim allusion is made to the provision for the recovery of a 15% penalty on unpaid taxes (Sec. 103), to the power to cancel the articles of incorporation of a delinquent corporation (Sec. 120), to the peanlty imposed on any one who shall exercise or attempt to exercise any powers, privileges or franchises under the articles of incorporation after the same are cancelled (Sec. 120), to the power to enjoin the transaction of any business by any delinquent public utility (Sec. 123), to each day's wilful failure to observe and comply with any order or direction of the Tax Commission or to perform any duty enjoined by law which the Tax Commission is authorized to administer, constituting a separate and distinct offense (Sec. 158), and to the provision that the holding of any section or part thereof void and ineffective shall not affect any other section or part thereof (Sec. 160). We are not concerned with the validity or operation of any of such

50 sections, for the reason that the pleadings tender no issue regarding them. Moreover, the penalties are clearly a separate part of the Act, and whether collectible or not, may be determined in a case involving an attempt to enforce them. Flint v.

Stone Tracy Co., p. 177; Willcox v. Consolidated Gas Co., 212 U. S., 53, 54.

We have noticed such objections as are made to the constitutionality of the law, as it is deemed necessary to consider. We do not find the statute to be obnoxious to either the state or the federal constitution.

It follows that the motion for an interlocutory injunction in each case must be denied. However, the questions involved are of such importance, that we assume that a review of our conclusions will be desired by the plaintiffs, pursuant to the special provision found in Sec. 266, Judicial Code, Act of March 3, 1911, 36 Stat., 1162.

We have accordingly concluded that the restraining orders heretofore granted shall be continued until an opportunity has been given for the plaintiffs to secure a review, and subject to conditions which will be prescribed in the order to be entered.

That the right of appeal directly to the Supreme Court from our decision may not be embarrassed, we refrain at the present time from passing upon the demurrers.

J. W. WARRINGTON,
U. S. District Judge.
J. E. SATER,
U. S. Dist. Judge.
WILLIAM L. DAY,
U. S. District Judge.

51 And afterwards, towit: on the 13th day of June, A. D. 1913, an Entry was made upon the Journal of said Court, in said Cause, which said Entry, is clothed in the words and figures following, towit:

Entry (Injunction Refused).

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Entry.

The plaintiff herein having made application for an interlocutory injunction herein suspending or restraining the enforcement and operation and execution of certain statutes of the State of Ohio by restraining the action of certain officers of said State, defendants herein, in the enforcement and execution of such statutes, and such

application having been presented to the Honorable John E. Sater, District Judge of said Court, in chancery sitting, and said District Judge thereupon having immediately called to his assistance to hear and determine said application, two other Judges of said Court, towit, the Honorable John W. Warrington, Circuit Judge of said Court, and the Honorable William L. Day, District Judge of said Court, and more than five days' notice of the hearing of said application having been given to the Governor and to the Attorney General of said State of Ohio and to the defendants herein, said application for an interlocutory injunction came on to be heard
52 before and by said three Judges of said Court, upon the verified bill of complaint of the plaintiff, the facts averred in which said bill of complaint were by the defendants, for the purpose of said application for an interlocutory injunction, and not otherwise, admitted to be true, and was argued by counsel for plaintiff and defendants; on consideration whereof the said Court, said three Judges sitting therein as aforesaid and concurring, find that said application for an interlocutory injunction is not well taken; and it is by the Court ordered that said interlocutory injunction asked for by the plaintiff as aforesaid be and it is hereby denied; to which finding of said Court and the denying of said interlocutory injunction plaintiff excepts. And the plaintiff thereupon gives notice of its intention to appeal from said order denying said interlocutory injunction, direct to the Supreme Court of the United States; and thereupon the Court fixes the appeal bond in the sum of five hundred ($500.00).

J. E. SATER, *D. J.*

Approved, this 27th day of May, 1913.

TIMOTHY S. HOGAN,
Attorney General Attorney for Defendants.

CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Of Counsel.

And afterwards, towit: on the 25th day of June A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court, its Certain Petition for Appeal with Order allowing same endorsed thereon, in this cause, which said Petition for Appeal is clothed in the word and figures following, towit:

53 *Petition for Appeal.*

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Petition for Appeal.

The above named plaintiff, The Marietta, Columbus and Cleveland Railroad Company, a corporation, conceiving itself aggrieved by the decree made and entered on the 13th day of June, 1913, in the above entitled cause, wherein and whereby said plaintiff was denied, after notice and hearing, an interlocutory injunction in said cause, suspending or restraining the enforcement, operation and execution of the statutes of the State of Ohio, by restraining the action of certain officers of said State, towit, the defendants herein, in the enforcement or execution of such statutes, does hereby appeal from said order and decree denying said interlocutory injunction, as aforesaid, to the Supreme Court of the United States, for the reason specified in the assignment of errors which is filed herewith; and prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

F. A. DURBAN &
ROB'T J. KING,
Attorneys for Plaintiff.

Dated this 14th day of June, 1913.

The foregoing claim of appeal is allowed, and bond is fixed at $500.00.

J. E. SATER,
Dist. Judge.

Dated this 25" day of June, 1913.

54 And afterwards, towit: on the 25th day of July A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court its certain Assignment of Errors on Appeal in this cause, which said Assignment of Errors on Appeal is clothed in the words and figures following, towit:

Assignment of Errors on Appeal.

In the District Court of the United States, Southern District of Ohio, Eastern Division. In Equity.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

DAVID S. CREAMER, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, Defendants.

Assignment of Errors on Appeal.

Plaintiff prays an appeal from the order and decree of this Court denying the plaintiff, after notice and hearing, an interlocutory injunction in said cause, to the Supreme Court of the United States, and assigns for error:

First. The Court erred in refusing the plaintiff an interlocutory injunction against defendants, restraining the defendant Creamer, Treasurer, from certifying plaintiff as delinquent for the current year under the Ohio statutes providing for the so-called excise tax (Act of May 31st, 1911, 102 Ohio Laws, 224,) and the defendant Fullington, Auditor, from receiving such certification and from adding any penalty to said tax or from preparing any duplicate of report thereof, and the defendants, Dittey, Munn and Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio,
55 from certifying to the Secretary of State that plaintiff had failed to pay said tax or penalty, and restraining them and the defendant Hogan, Attorney General, from taking any steps toward the collection or enforcement of said tax against plaintiff or the cancellation of its articles of incorporation.

Second. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the statutes of Ohio, (Act of May 31st, 1911, 102 Ohio Laws, 224,) upon the privilege of carrying on plaintiff's intrastate business for the current year, was wholly in excess of the value of that privilege, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and of the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Third. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the classifications and sub-classifications in the Ohio statutes providing

for the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) were arbitrary, unreasonable, unduly and unjustly discriminatory against the plaintiff, and not a legitimate exercise of legislative power or discretion, thereby violating the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or war-
56 rant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fourth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes providing for the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) involved a discrimination against and imposed a burden upon interstate commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fifth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes imposing the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) are a regulation of and a burden upon foreign commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Sixth. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) is in reality a double tax upon plaintiff's property, lacking uniformity and equality, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 2, Article 12, of the Constitution of Ohio, did not call for or warrant the granting of a temporary injunction against the de-
57 fendants, as prayed for in the bill.

Seventh. The Court erred in holding that the facts averred in the bill, (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the fines, penalties and forefeitures provided for in the Ohio statutes relating to the so-called excise tax, (Act of May 31st, 1911, 102 Ohio Laws, 224,) and the provisions therein seeking to prevent a judicial review of the validity thereof, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 16 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Eighth. The Court erred in holding that the guaranty against

the imposition of a privilege tax greater in amount than the reasonable value of the privilege taxed, involved in the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, as interpreted and construed by the Ohio Supreme Court, particularly in the case of Southern Gum Company v. Laylin, Secretary of State, 66 Ohio State, 578, is applicable and operative only where the privilege tax is generally confiscatory and oppressive, and may not be invoked in individual cases wherein the tax exceeds the reasonable value of the privilege originally conferred or its continued annual value thereafter, and in consequently refusing relief by a temporary injunction from the current so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) on the privilege of carrying on its intrastate business, because it had not been shown that the tax in other instances, and generally, exceeded the reasonable value of the privilege taxed.

58 Ninth. The Court erred in holding the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) to be an excise tax on the doing of corporate intrastate business.

Tenth. The Court erred in holding that the so-called excise tax imposed by the Ohio Statutes, (Act of May 31st, 1911, 1902 Ohio Laws, 224,) might be regarded as an exercise of the police power of the State, similar in its nature to that involved in the taxation of the business of trafficking in intoxicating liquors; and thereby saved from Constitutional infirmity.

Eleventh. The Court erred in holding that the so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) might be regarded as a legislative act to compensate the State and indemnify the tax payer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the Government over corporate public utilities and for the benefit of those who own and operate such; and thereby saved from Constitutional infirmity.

Twelfth. The Court erred in holding that relief could not be afforded the plaintiff under the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, or the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, from the current so-called excise tax imposed by the Ohio statutes, (Act of May 31st, 1911, 102 Ohio Laws, 224,) on the ground that in plaintiff's case such tax wholly exceeded the value of the privilege taxed, without at the same time declaring the said tax invalid in its entirety and throughout the field of its application, or, at least, as to all utilities classed with the plaintiff.

F. A. DURBAN &
ROB'T J. KING,
Attorneys for Plaintiff.

And afterwards, towit: on the 25th day of June, A. D. 1913, there was filed in the Clerk's Office of said Court, a certain Bond in this

cause, which said Bond is clothed in the words and figures following, towit:

59 *Bond.*

Know all men by these presents, That we, The Marietta, Columbus & Cleveland Railroad Company, as principal, and The Title Guarantee and Surety Co., as sureties, are held and firmly bound unto Robert M. Dittey, Frank E. Muns and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, David S. Creamer Treasurer of the State of Ohio, Edward M. Fullington, Auditor of the State of Ohio, and Timothy S. Hogan, Attorney General of the State of Ohio, in the full and just sum of Five Hundred Dollars to be paid to the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, David S. Creamer, Treasurer of the State of Ohio, Edward M. Fullington, Auditor of the State of Ohio, and Timothy S. Hogan, Attorney General of the State of Ohio, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ouselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals asd dated this 25th day of June, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a term of the United States District Court for the Southern District of Ohio, Eastern Division, in a suit depending in said Court, between the Marietta, Columbus & Cleveland Railroad Company and Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, et al., a decree was rendered against the said The Marietta, Columbus and the said The Marietta Columbus & Cleveland Railroad Company and Cleveland Railroad Company having obtained an appeal and filed a copy thereof in the Clerk's

60 Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Robert M. Dittey, Frank E. Munn and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, David S. Creamer, Treasurer of the State of Ohio, Edward M. Fullington, Auditor of the State of Ohio, and Timothy S. Hogan, Attorney General of the State of Ohio, citing and admonishing them to be and appear at a session of the United States Supreme Court, to be holden at the City of Washington.

Now, the condition of the above obligation is such, That if the said The Marietta, Columbus & Cleveland Railroad Company, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY,
By ROB'T J. KING, *Its Att'y.*
THE TITLE GUARANTY & SURETY CO.,
By C. H. BANCROFT, *Att'y in Fact.*

Sealed and delivered in presence of

____ ____

____ ____

Approved by
(SEAL) J. E. SATER,
U. S. District Judge, S. D. O.

And afterwards, towit: on the 30th day of June, A. D. 1913, came the Plaintiff, by its Attorneys, and filed in the Clerk's Office of said Court its certain Precipe for Transcript in this cause, which said Precipe for Trasscript is clothed in the words and figures following, towit:

61 *Precipe for Transcript.*

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
DAVID S. CREAMER, Treasurer of State of the State of Ohio, et al., Defendants.

Precipe.

To the Clerk:

You are requested to take a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript the entire record.

Respectfully,

F. A. DURBAN &
R. J. KING,
Attorneys for Plaintiff.

Service of a copy of the foregoing precipe is hereby acknowledged this twenty-fifth day of June, 1913.

TIMOTHY S. HOGAN,
Attorney General.
FRANK DAVIS, JR. &
CLARENCE D. LAYLIN,
Attorneys for Defendants.

62 THE UNITED STATES OF AMERICA,
Southern District of Ohio,
Eastern Division, ss:

I, E. E. Dilley, Clerk of the District Court of the United States, within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and correct transcript of the record, as

the same appears on file and of record in the Clerk's Office of said Court, in the therein entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Columbus, Ohio, this 30th day of June, 1913.

[Seal United States District Court, Southern Dist. Ohio.]

B. E. DILLEY, *Clerk*,
By C. P. WHITE, JR., *Deputy*.

[Endorsed:] No. 1600. United States District Court, Southern District of Ohio, Eastern Division. The Marietta, Columbus and Cleveland Railroad Company vs. David S. Creamer, Treasurer of State of the State of Ohio, et al. Certified copy of Transcript of Record.

63 *Citation*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to David S. Creamer, Treasurer of the State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of Ohio, Eastern Division, and filed in the Clerk's office of said Court on the 25th day of June A. D. 1913, in a case wherein The Marietta, Columbus and Cleveland Railroad Company, a corporation, is appellant, and you are the appellees, to show cause, if any, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why
64 speedy justice should not be done to the parties in that behalf.

Witness the Honorable John E. Sater, District Judge of said District Court, this 25th day of June, A. D. 1913.

J. E. SATER,
District Judge of the United States District Court for the Southern District of Ohio, Eastern Division.

Service of a copy of this citation is hereby admitted, this 25th day of June, A. D. 1913.

TIMOTHY S. HOGAN,
Attorney General, Solicitor for the said Appellees.
CLARENCE D. TAYLOR,
FRANK DAVIS, JR.,
Of Counsel.

65 [Endorsed:] No. 1600. Citation United States of America, ss. The President of the United States to David S. Creamer, Treasurer of State of the State of Ohio; Edward M. Fullington, Auditor of State of the State of Ohio; Timothy S. Hogan, Attorney General of the State of Ohio; Robert M. Dittey, Frank E. Munn, and Christian Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio. Filed Jun- 25, 1913. B. E. Lilley, clerk.

Endorsed on cover: File No. 23,794. S. Ohio D. C. U. S. Term No. 643. The Marietta, Columbus and Cleveland Railroad Company, appellant, vs. David S. Creamer, Treasurer of the State of Ohio, Edward M. Fullington, Auditor of the State of Ohio, et al. Filed July 14th, 1913. File No. 23,794.

3

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 642.

Supreme Court, U. S.
FILED.
OCT 17 1913
JAMES H. McKENNEY,
Clerk.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY,

APPELLANT,

vs.

ROBERT M. DETTEY, ET AL., AS THE TAX COMMISSION OF OHIO, ET AL.

APPELLEES.

Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

MOTION TO ADVANCE: CONSENT AND STATEMENT.

TIMOTHY S. HOGAN,
Attorney General of Ohio,
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.

F. B. FOOTHAKER, Law Printer, 73-83 N. Third St., Columbus, O.

Supreme Court of the United States

OCTOBER TERM, 1913,

No. 642.

THE OHIO RIVER AND WESTERN RAILWAY COMPANY,

APPELLANT,

vs.

ROBERT M. DITTEY, ET AL., AS THE TAX COMMISSION OF OHIO, ET AL.

APPELLEES.

MOTION TO ADVANCE.

Appellees move that this case be advanced, for the reason that it involves and affects a matter of general public interest, and is a case involving the collection of the revenue of the State of Ohio.

TIMOTHY S. HOGAN,
Attorney General of Ohio.
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.

WAIVER OF NOTICE AND CONSENT.

The appellant, by its counsel, hereby waives notice of above motion and agrees and consents that the same may be presented to the court on Monday, October 20, 1913, and consents to the granting of the same.

F. A. DURBAN,
R. J. KING,
Attorneys for Appellant.

STATEMENT.

This case involves the constitutionality of an Act of the General Assembly of the State of Ohio, imposing excise taxes, at different rates, on railroads, interurban railroads, electric light companies, natural gas companies and various other public utilities. Appellant will contend in this court that the act violates the constitutional limitations, in that its rates of taxation are, as to appellant and others in a similar situation, confiscatory; in that the classification of the subjects of taxation, made by the act, is unreasonable and results in a denial to the appellant, and others in a similar situation, of the equal protection of the laws of the state; and that the practical result of the operation of the acts is to impose burdens upon foreign commerce and commerce among the several states.

The District Court sustained the act against all of these objections and refused to issue a temporary injunction; but the officers of the state are embarrassed in their administration of the act by the apprehension of the issuance of an injunction in this court, and in other similar cases, and are taking no steps to administer the same as to objecting public utilities, pending the determination of this case.

The entire expenses of the government of the State of Ohio, excepting the support of its educational institutions, public schools, and a few minor departments which are self-supporting, are paid from what is known as the "General Revenue Fund" of the state. The total recepits of the said "General Revenue Fund" for the fiscal year ending November 15, 1912, amounted to $10,253,171. Of this

amount the sum of $2,951,188.54 was derived from excise taxes on railroads and other public utilities.

The questions raised in the case are therefore of vital interest to the state itself, as well as to the subjects of the tax; and it is suggested that the circumstances are so special and peculiar as to justify the advancement of the case.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General of Ohio.
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.

Supreme Court of the United States

OCTOBER TERM, 1913,

No. 643.

THE MARIETTA, COLUMBUS & CLEVELAND RAILWAY COMPANY,

APPELLANT,

vs.

DAVID S. CREAMER, TREASURER OF THE STATE OF OHIO, ET AL.,

APPELLEES.

MOTION TO ADVANCE.

Appellees move that this case be advanced, for the reason that it involves and affects a matter of general public interest, and is a case involving the collection of the revenue of the State of Ohio.

TIMOTHY S. HOGAN,
Attorney General of Ohio.
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.

WAIVER OF NOTICE AND CONSENT.

The appellant, by its counsel, hereby waives notice of above motion and agrees and consents that the same may be presented to the court on Monday, October 20, 1913, and consents to the granting of the same.

F. A. DURBAN,
R. J. KING,
Attorneys for Appellant.

STATEMENT.

This case involves the constitutionality of an Act of the General Assembly of the State of Ohio, imposing excise taxes, at different rates, on railroads, interurban railroads, electric light companies, natural gas companies and various other public utilities. Appellant will contend in this court that the act violates the constitutional limitations, in that its rates of taxation are, as to appellant and others in a similar situation, confiscatory; in that the classification of the subjects of taxation, made by the act, is unreasonable and results in a denial to the appellant, and others in a similar situation, of the equal protection of the laws of the state; and that the practical result of the operation of the acts is to impose burdens upon foreign commerce and commerce among the several states.

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The entire expenses of the government of the State of Ohio, excepting the support of its educational institutions, public schools, and a few minor departments which are self-supporting, are paid from what is known as the "General Revenue Fund" of the state. The total receipts of the said "General Revenue Fund" for the fiscal year ending November 15, 1912, amounted to $10,253,171. Of this

amount the sum of $2,951,188.54 was derived from excise taxes on railroads and other public utilities.

The questions raised in the case are therefore of vital interest to the state itself, as well as to the subjects of the tax; and it is suggested that the circumstances are so special and peculiar as to justify the advancement of the case.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General of Ohio.
CLARENCE D. LAYLIN,
FRANK DAVIS, JR.,
Counsel for Appellees.